No. 91-1538-CFX
Status: GRANTED

Title: Sandra Jean Smith, Petitioner
v.
United States

Docketed:
March 20, 1992

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Bederman,David J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Mar 20 1992	G	Petition for writ of certiorari filed.
3	Apr 21 1992		Order extending time to file response to petition until May 22, 1992.
4	May 26 1992		Brief of respondent United States in opposition filed.
5	May 27 1992		DISTRIBUTED. June 12, 1992
6	Jun 15 1992		Petition GRANTED.
			**********
7	Jul 20 1992	G	Motion of petitioner to dispense with printing the joint appendix filed.
8	Jul 24 1992		Brief of petitioner Sandra Smith filed.
10	Aug 6 1992		Order extending time to file brief of respondent on the merits until September 4, 1992.
11	Sep 4 1992		Motion of petitioner to dispense with printing the joint appendix GRANTED.
12	Sep 4 1992		Brief of respondent United States filed.
13	Sep 30 1992		Reply brief of petitioner filed.
14	Oct 13 1992		SET FOR ARGUMENT MONDAY, DECEMBER 7.1992. (3RD CASE).
15	Oct 15 1992		CIRCULATED.
16	Oct 19 1992		Record filed.
		*	Original proceedings United States District Court, District of Oregon.
17	Oct 20 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
18	Dec 7 1992		ARGUED.

(1)

91-1538

No. 91-___

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

SANDRA JEAN SMITH,

Petitioner

v.

UNITED STATES OF AMERICA

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID J. BEDERMAN
Counsel of Record
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall
Atlanta, Georgia 30322
(404) 727-6822

ALLEN T. MURPHY, JR.
Attorney for Petitioner
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97201

DAVID GERNANT
Of Counsel
P.O. Box 23594
Portland, Oregon 97281

QUESTION PRESENTED FOR REVIEW

Is Antarctica a "foreign country" for the purposes of the Federal Tort Claims Act?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SANDRA JEAN SMITH, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Sandra Jean Smith respectfully prays that a writ of certiorari issue to review the December 24, 1991, judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991, *Smith* v. *United States*, slip op. 16931 (9th Cir. Dec. 24, 1991), including the dissenting opinion of Judge Fletcher, will be reported at 953 F.2d 1116 (9th Cir. 1991) and is reprinted in the appendix hereto, at App. 1, infra.

The opinion and judgment of the U.S. District Court for the District of Oregon, Judge Frye, presiding, of January 6, 1989, was reported at 702 F. Supp. 1480 (D. Or. 1989), and is reprinted in the appendix, at App. 18, infra.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991. A Petition for Rehearing and Suggestion for Rehearing En Banc were both denied on that same date. *Smith* v. *United States*, 953 F.2d 1116, slip op. at 16933 (9th Cir. Dec. 24, 1991). The Supreme Court has jurisdiction to review cases from the federal Courts of Appeals by virtue of 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The Federal Tort Claims Act, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)), excludes from its jurisdiction "[a]ny claim arising in a foreign country." *Id.* § 2680 (codified at 28 U.S.C. § 2680(k) (1988)).

STATEMENT OF THE CASE

The Petitioner, Sandra Jean Smith, is the widow of John Emmett Smith, and the duly appointed representative of his estate. Mr. Smith was a carpenter by trade, and was employed by ITT Antarctic Services, a firm which provides logistic support for U.S. operations in the Antarctic. Mr. Smith arrived at McMurdo Station, Antarctica, on October 27, 1986, and began work in building some structures at the Station, which is exclusively operated by the United States government.

On November 23, 1986, Mr. Smith and two companions took a recreational hike to a site near McMurdo Station. The party wandered off a marked route. Mr. Smith fell into a crevasse and was killed. The gravamen of Petitioner's suit against the United States, filed in the U.S. District Court in Portland, Oregon, on August 5, 1987, is that its agents, the civilian and military authorities which operate the McMurdo Station, failed to warn Mr. Smith of the dangers in deviating from flagged routes in any off-base travel.

The District Court, Frye, J., presiding, granted the United States's motion to dismiss the action on the ground

that the court lacked subject matter jurisdiction under the Federal Tort Claims Act. *Smith* v. *United States*, 702 F. Supp. 1480, 1482-83 (D. Or. 1989). The U.S. Court of Appeals for the Ninth Circuit affirmed. *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931, at 16940 (9th Cir. Dec. 24, 1991).

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HOLDING, THAT CLAIMS ARISING IN ANTARCTICA ARE EXCLUDED BY THE FTCA'S "FOREIGN COUNTRY" EXCEPTION, IS CONTRARY TO THE PURPOSE AND INTENT OF THAT ACT

The U.S. Court of Appeals held in the decision below, *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931 (9th Cir. Dec. 24, 1991), that the United States has not waived immunity from suits brought for the government's acts or omissions in the Antarctic. *Id.* at 16934, 16940. The Court of Appeals concluded that Antarctica is a "foreign country" for the purposes of the Federal Tort Claims Act, 28 U.S.C. § 2680(k), the sole avenue by which the Petitioner may sue the United States for the wrongful death of her husband. Petitioner submits that the reasoning adopted by the Ninth Circuit defies precedent, perverts the clear language of the statute, and undermines the intent and purpose of the Federal Tort Claims Act (hereinafter "the Act" or "FTCA").

The issue raised by this Petition is of some moment, despite the novel geographic setting. The Ninth Circuit's holding that Antarctica is a "foreign country" under the FTCA -- thus barring jurisdiction under that Act -- is squarely contradicted by the D.C. Court of Appeals' earlier decision in *Beattie* v. *United States*, 756 F.2d 91 (D.C. Cir. 1984). Moreover, Petitioner believes that the Ninth Circuit's understanding of the rules of statutory interpretation (in cases where a law's extraterritorial application is at issue) runs counter to this Court's recent pronouncement in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. ___, 113 L.Ed. 2d 274 (1991), as well as being implicated in the currently-submitted case of *Lujan* v. *Defenders of Wildlife* (U.S. docket no. 90-1424) (argued Dec. 3, 1991). Finally, given the intensification of U.S. activities in the Antarctic, claims for government negligence there are likely to increase, making this an important issue to be settled.

This Petition clearly satisfies the considerations of Rule 10 on its own merits. Petitioner does acknowledge that the pending decision in *Lujan* v. *Defenders of Wildlife* may also touch upon the underlying issue of the extraterritorial application of U.S. laws.[1] To the extent it might, Petitioner also seeks a summary remand of her case to the Ninth Circuit for further consideration in view of that holding.

1. The Ninth Circuit correctly notes that the FTCA does not define the term "foreign country" in 28 U.S.C. §

[1] The Petition in *Defenders of Wildlife* was granted for consideration of two questions: (1) the standing of Respondents to bring a claim under the Endangered Species Act (ESA), and (2) the application of the ESA's section 7 to government activities on the high seas and in foreign countries. *See Defenders of Wildlife* v. *Lujan*, 911 F.2d 117 (8th Cir. 1990).

2680(k). But instead of carefully reviewing the congressional intent of the "foreign country" exception of the FTCA, the Ninth Circuit blithely assumes that to conclude Antarctica is *not* a foreign country would "render two other provisions of the FTCA nonsensical and require us to create rules governing liability for tortious acts and omissions in Antarctica." *Smith* v. *United States*, slip op. at 16936. These illusory concerns will be addressed below, but what is important to note here is that the Ninth Circuit adopted a "mechanical jurisprudence," in the words of Justice Frankfurter in *United States* v. *Spelar*, 338 U.S. 217, 223 (1949) (Frankfurter, J., concurring), and simply ignored the standard canons of statutory interpretation in cases such as this.

The Ninth Circuit agreed with the District Court's ruling that Congress did not intend "to waive sovereign immunity for torts alleged to have been committed by government employees outside the territorial jurisdiction of the United States." *Smith* v. *United States*, slip op. at 16935. This is simply wrong. In the only case in which this Court considered the FTCA's "foreign country" exception, *United States* v. *Spelar*, 338 U.S. 217 (1949), this Court noted that Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 221. In other words, the Court in *Spelar* recognized that a claim under the FTCA could arise outside of the territory of the United States, *provided* that the government's act or omission did not occur in a place where another nation's tort law was in force. Antarctica is just such a place, as the majority in the decision below concluded. *Smith* v. *United States*, slip op. at 16934 ("Antarctica [is] a sovereignless

region without civil tort law").[2]

This interpretation of 28 U.S.C. § 2680(k) is bolstered by even a cursory examination of the legislative history. In 1940, language proposed before the Senate Judiciary Committee would have made the FTCA "applicable only to damages or injury occurring within the geographic limits of the United States, Alaska, Hawaii, Puerto Rico, and the Canal Zone."[3] In the same year, the House Judiciary Committee considered similar language that would have limited claims to those "arising in the United States or its territories."[4] Both of these proposals would have limited the FTCA to specific geographic areas. Because these proposals were rejected, it seems that Congress was *not* categorically denying claims arising outside of the territory of the United States. Instead, as stated above, Congress's concern was in ensuring that no claim would be subject to a foreign nation's tort law.

[2] The Ninth Circuit's decision also works a bizarre result insofar as a wrongful death claim against the United States arising just offshore the McMurdo Station *would* be actionable under the Death on the High Seas Act (DOHSA), ch. 111, § 1, 41 Stat. 537 (1920) (codified at 46 U.S.C. § 761 (1988)), through the Suits in Admiralty Act, ch. 95, § 4, 41 Stat. 525 (1920) (codified at 46 U.S.C. § 745 (1988)), and the Public Vessels Act, ch. 428, § 1, 43 Stat. 1112 (codified at 46 U.S.C. § 781 (1988)), while a claim arising on the Antarctic continent itself would be barred under the FTCA. There is no question that both places, to use the Ninth Circuit's words, are "sovereignless."

[3] *See Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38, 65 (1940).

[4] *See Tort Claims Against the United States: Hearings on H.R. 7236 before Sucomm. No. 1 of the House Judiciary Comm.*, 76th Cong., 3d Sess. 3 (1940).

This was why the expression "foreign country" was used in the FTCA, and not a narrower specification of claims arising in the territory of the United States. As this Court recently reaffirmed in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. ___, 113 L.Ed. 2d 274 (1991), legislation is presumed not to apply extraterritorially "'unless a contrary intent appears'." *Id.* at ___, 113 L.Ed. 2d at 282 (*quoting Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). But this Court in *Arabian American* went on to say that this rule of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* (*citing McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)). Because Antarctica is a place without a sovereign -- and thus not a "country" -- to allow claims to arise there under the FTCA would not violate the concerns stated by this Court in *Spelar* and *Arabian American*. The Ninth Circuit chose to disregard the clear language and legislative intent of the FTCA, as well as the rules set forth by this Court for its proper construction.

2. If allowed to go unreviewed, the Ninth Circuit's rationale for deciding that Antarctica is a "foreign country" under the FTCA will work substantial mischief.

For example, the court below seized on the venue provision of the FTCA, 28 U.S.C. § 1402(b) (1982) (a tort claim against the United States "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred"), and concluded that

> "[w]hile Smith . . . is able to lay venue in her state of residence because it has a district court, venue would not exist if the plaintiff happened to reside outside of the United States. If we were to find that Antarctica is not a foreign country, a resident of New Zealand, or any other country, injured by the acts or omissions of a U.S. employee in Antarctica, would find sovereignty waived but no venue in which to proceed against the United States. It is unlikely that Congress intended to create a tort remedy in cases for which no venue exists."

Smith v. *United States*, slip op. at 16937-38 (footnotes omitted).

The Ninth Circuit has thus fashioned a new, and utterly unsupportable, canon of statutory construction which would presume that where Congress gives a right of action, it also lays a venue. This Court has consistently ruled that there have always existed situations "in which the federal courts have jurisdiction but there is no district in which venue is proper." *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U.S. 706, 710 n.8 (1972). While such gaps should be closed wherever possible, *id.*, that does not mean that a statute should be construed to *deny* jurisdiction for one claimant, just because a differently-situated plaintiff might not find a proper venue. This is precisely what the Ninth Circuit accomplished in its ruling.

Likewise, the Ninth Circuit read the choice-of-law provision of the FTCA, 28 U.S.C. § 1346(b) (1988) (the statute imposes liability "in accordance with the law of the place where the act or omission occurred"), to indicate that Congress did not intend for the FTCA to apply to the Antarctic, which has no tort law of its own. *Smith* v. *United States*, slip op. at 16938. As discussed above, the clear intent of the "foreign country" exception was to prevent a suit arising from a place where a foreign tort law was in force.

The Ninth Circuit adopted the reasoning of Judge (now Justice) Scalia, dissenting in *Beattie* v. *United States*, that "the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties." 756 F.2d at 111 (Scalia, J., dissenting).

Petitioner maintains that the majority in *Beattie* (as well as the dissent in the court below) were right in holding that Antarctica presents "a situation *directly opposite* to the [Congress's express] fear of becoming entangled in foreign law, which produced the 'foreign country' exception." *Id.* at 105 (original emphasis). The Ninth Circuit worried that federal courts would be called-upon to "create substantive or choice-of-law rules governing liability for tortious acts and omissions in Antarctica." *Smith* v. *United States*, slip op. at 16939. To the extent that a *substantive* tort law would have to be fashioned, the Ninth Circuit's fears would be justified. But the FCTA, by its very terms, *see* 28 U.S.C. § 1346(b), directs the application of choice-of-law principles, and the federal courts have taken-up that challenge wherever necessary.[5]

The Ninth Circuit simply decided that it was too hard

[5] *See, e.g., Ducey* v. *United States*, 713 F.2d 504, 508 n.2 (9th Cir. 1983) (Nevada law was chosen over California law in wrongful death action arising from flash flood); *Sami* v. *United States*, 617 F.2d 755, 763 (D.C. Cir. 1979) (rejecting possibility that West German law would be applied to a claim brought for false imprisonment because such an application would conflict with "a strong public policy of the forum"); *Brock* v. *United States*, 601 F.2d 976, 978-80 (9th Cir. 1979) (accident occurring over the Columbia River on Bonneville Dam, where both Oregon and Washington exercised jurisdiction); *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (rejecting Vietnamese law as unsuitable).

to apply those principles in this case. This abandonment of the choice-of-law analysis flatly contradicts the congressional intent of the FTCA. Nor was it a sufficient reason to deny jurisdiction here.

CONCLUSION

This Petition is apparently the first ever to squarely raise an issue of the legal consequences of U.S. activities in Antarctica. It also implicates important questions of statutory construction for laws with potential extraterritorial effect. For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
EMORY UNIVERSITY
SCHOOL OF LAW
Gambrell Hall
Atlanta, Georgia 30322
(404) 727-6822

DAVID GERNANT
Of Counsel
P.O. Box 23594
Portland, Oregon
97281

ALLEN T. MURPHY, JR.
Attorney for Petitioner
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97201

Submitted: March 20, 1992

JAN

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANDRA JEAN SMITH, *Plaintiff-Appellant,* v. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. 89-35088 D.C. No. CV-87-883-HF ORDER AND OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
July 9, 1990—Portland, Oregon

Filed May 1, 1991
Opinion Withdrawn December 24, 1991
Opinion Filed December 24, 1991

Before: Alfred T. Goodwin, Betty B. Fletcher and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Goodwin; Dissent by Judge Fletcher

SUMMARY

Jurisdiction/Governmental Torts

Affirming a district court judgment dismissing an action for lack of subject matter jurisdiction, the court of appeals held that the FTCA does not apply to claims arising in Antarctica.

Appellant Sandra Jean Smith challenged the district court's Rule 12 dismissal of her FTCA action for the wrongful death of her husband. Smith's actions alleged negligent acts or omissions by the United States in Antarctica. The district court dismissed her claim under the "foreign country" exception to the Act.

[1] The court agreed with the district court's determination that the words "foreign country" are not self-defining and that Congress did not intend to waive sovereign immunity for torts alleged to have been committed by government employees outside the territorial jurisdiction of the United States. [2] Consequently, the court held that the FTCA does not apply to claims arising in Antarctica. To hold otherwise would render other provisions of the Act nonsensical and require the court to create rules governing liability for tortious acts and omissions in Antarctica.

[3] It was unlikely that Congress intended to create a tort remedy in cases, such as here, for which no venue existed. [4] A further indication that the FTCA was not intended to apply in Antarctica was the choice-of-law problem presented in extending the Act's provisions to that region. Antarctica has no tort law. [5] The court declined to adopt the D. C. Circuit's conclusion that because the Act leads the court to a place where there is no civil tort law to apply, the court must use its own choice-of-law rules to determine which law applies. The court instead agreed with the conclusion that this choice-of-law dilemma evidences that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties. [6] While the court acknowledged that the United States conducts activity in Antarctica, it was not cited to any legislative history that suggests that the federal court should create substantive or choice-of-law rules governing liability for tortious acts and omissions in Antarctica. [7] Even if the court adopted the view that Antarctica is not a foreign country, it still could not

agree that the coverage of the FTCA extends to Antarctica. Congressional intent was far from explicit.

Judge Fletcher dissented, stating that the majority's approach causes it to overstate greatly the implications of construing Antarctica as something other than a foreign country and leads it to a conclusion inconsistent with the fundamental underpinnings of the FTCA.

COUNSEL

David Gernant, Portland, Oregon, for the plaintiff-appellant.

Mark B. Stern, United States Department of Justice, Washington, D.C., for the defendant-appellee.

ORDER

The opinion filed May 1, 1991, and appearing at 932 F.2d 791 (9th Cir. 1991) is withdrawn.

The panel has voted unanimously to deny the petition for rehearing. Judges Fletcher and Fernandez have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

GOODWIN, Circuit Judge:

Sandra Jean Smith appeals the Rule 12 dismissal of her Federal Tort Claims Act (FTCA) action for the wrongful death of her husband. Smith's action alleged negligent acts or omissions by the United States in Antarctica. The district court dismissed her claim under the "foreign country" exception to the statute. *Smith v. United States*, 702 F. Supp. 1480 (D. Or. 1989). We affirm.[1]

I

"The United States, as a sovereign entity, is immune from suit unless it has consented to be sued." *Cominotto v. United States*, 802 F.2d 1127, 1129 (9th Cir. 1986) (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Under the FTCA, the United States has consented to be sued for tort damages "caused by the negligent or wrongful act or omission of any employee of the Government. . . ." 28 U.S.C. § 1346(b) (1982). The FTCA, however, is a limited waiver of sovereign immunity under which certain categories of torts are specifically excluded. *See Grunnet v. United States*, 730 F.2d 573, 574-75 (9th Cir. 1984); 28 U.S.C. § 2680 (listing fourteen exceptions to section 1346(b)). Courts are without jurisdiction over any excluded claim. *See Cominotto*, 802 F.2d at 1129.

Under the FTCA, the United States retains sovereign immunity for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The central question in this case is whether Antarctica, a sovereignless region without civil tort law,[2] is a

[1]The facts of this case, as stipulated by the parties, are provided in Exhibit A to the district court's opinion. *Smith*, 702 F. Supp. at 1483-84.

[2]"Antarctica can properly be characterized as something of an international anomaly." *Beattie v. United States*, 756 F.2d 91, 93 (D.C. Cir. 1984). Under various theories of ownership, seven countries (Argentina, Australia, Chile, France, Great Britain, New Zealand, and Norway), have asserted claims to approximately eighty percent of the continent. *See* Bederman, *Exploring the Foreign Country Exception: Federal Tort Claims in Antarctica*, 21 Vand. J. Int'l L. 731, 754-55 & nn.121-25 (1988). These claims, however, are suspended by the terms of the Antarctica Treaty, 12 U.S.T. 795, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (Dec. 1, 1959), to which the United States is party. Article 4 of the Treaty states that while the treaty is in force no act shall "constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica." *Id.* at art IV.

foreign country within the meaning of Section 2680(k).[3]

[1] The district court recognized that the words "foreign country" are not self-defining and determined that Congress did not intend to waive sovereign immunity for torts alleged to have been committed by government employees outside the territorial jurisdiction of the United States. We agree.

The FTCA does not define the term "foreign country." *See* 28 U.S.C. §§ 1271 & 2680(k) (1982). *See also Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988) (the starting point in determining Congress's intent is the language itself). Moreover, as we have acknowledged, the term "foreign country" is capable of different meanings. *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir.) ("[t]he words 'foreign country' are not words of art, carrying a fixed and precise meaning in every context"), *cert. denied*, 379 U.S. 867 (1964); *see also United States v. Spelar*, 338 U.S. 217, 223 (1949) (Frankfurter, J., concurring) (to assume that the term "foreign country" is "self-defining, not at all involving a choice of judicial judgment, is mechanical jurisprudence."); *Burnet v. Chicago Por-*

[3]It is undisputed that Smith's cause of action arose from alleged acts or omissions by the United States in Antarctica. Smith's claim is not a "headquarters" claim, which typically involves an allegation of negligent guidance or conduct within the United States resulting in damage to the plaintiff in a foreign country. *Cf. Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978) (recognizing the availability of headquarters claims under the FTCA).

trait Co., 285 U.S. 1, 5 (1932) ("[t]he word 'country,' in the expression 'foreign country' is ambiguous"); *Beattie*, 756 F.2d at 109-110 (Scalia, J., dissenting) (discussing the different possible definitions of the term "foreign country"). Because Congress's intent is not clear from the statute's language, we must ascertain a definition for "foreign country" that is compatible with the context and purpose of the FTCA. *Meredith*, 330 F.2d at 10 (in defining "foreign country" for purposes of the FTCA, "[i]t is necessary to consider the object of the enactment and to construe the expression 'foreign country' so as to achieve, and not defeat, its aim") (quoting *Burnet*, 258 U.S. at 7).

We are aided in our analysis by the comprehensive opinions of the D.C. Circuit in *Beattie*. Faced with this same question, the court explored the relevant legislative history and case law, and concluded that Antarctica is not a "country" and therefore, as a stateless area, could not be a foreign country. 756 F.2d at 98. The dissent shifted the focus of the inquiry from the interesting but abstract question of what is a country, to the purpose of the FTCA. *Id.* at 107 (Scalia, J., dissenting).

II

[2] We agree with the approach and conclusions of then Judge Scalia and hold that the FTCA does not apply to claims arising in Antarctica. To hold otherwise would render two other provisions of the FTCA nonsensical and require us to create rules governing liability for tortious acts and omissions in Antarctica. *See Central Mont. Elec. Power Co-op., Inc. v. Administrator, Bonneville Power Admin.*, 840 F.2d 1472, 1478 (9th Cir. 1988) (we "avoid any statutory interpretation that renders any section superfluous and does not give effect to all of the words used by Congress"); *Hughes Air Corp. v. Public Util. Com'n*, 644 F.2d 1334, 1338 (9th Cir. 1981) (it is a "basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless").

[3] The venue provision of the FTCA provides that a tort claim against the United States "may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. § 1402(b) (1982). As Judge Scalia wrote in his dissent:

> If, as the appellees assert, 'foreign country' means only 'foreign state,' and sovereign immunity has therefore been waived with respect to torts occurring in stateless regions such as Antarctica, then the venue provision for those regions makes no sense . . .

Beattie, 756 F.2d at 110 (Scalia, J., dissenting). While Smith, as the personal representative of a deceased victim, is able to lay venue in her state of residence because it has a district court, venue would not exist if the plaintiff happened to reside outside the United States. If we were to find that Antarctica is not a foreign country, a resident of New Zealand, or of any other country,[4] injured by the acts or omissions of a U.S. employee in Antarctica, would find sovereignty waived but no venue in which to proceed against the United States.[5] It is

[4] In *Spelar*, the Court noted that the original draft of the "foreign country" exception "exempted all claims 'arising in a foreign country in behalf of an alien' [but that] at the suggestion of the Attorney General, the last five words were excised . . . so that the exemption [did not] turn upon 'the fortuitous circumstances of the injured party's citizenship.'" 338 U.S. at 220 (quoting Hearings, H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., 29, 35, 66). The United States is thus open to suit by foreign citizens under the FTCA.

[5] The D.C. Circuit was able to avoid this problem in *Beattie*, where the plaintiffs were residents of Great Britain and New Zealand, through the concept of "pendent venue" because the plaintiffs also sought relief under a "headquarters" claim alleging damages resulting from the negligence of U.S. officers in Washington, D.C. *Beattie*, 756 F.2d at 100-04. The lack of venue problem cannot be so easily avoided in many cases, however.

unlikely that Congress intended to create a tort remedy in cases for which no venue exists.

[4] A further indication that the FTCA was not intended to apply in Antarctica is the choice-of-law problem presented in extending the Act's provisions to that region. The statute imposes liability "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1982). *See also Richards v. United States*, 369 U.S. 1, 9 (1962) ("We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act"). As a stateless area over which a number of treaty powers have specifically declined to assert claims of sovereignty, Antarctica has no tort law. *See* Antarctica Treaty, *supra* at art. IV(2); *see also Beattie*, 753 F.2d at 111 (Scalia, J. dissenting).

[5] We decline to adopt the D.C. Circuit's conclusion that because "§ 1346(b) leads the court to a place where there is no civil tort law to apply" the court must use its own choice-of-law rules to determine which law applies. *Beattie*, 756 F.2d at 104-05. *See Ducey v. United States*, 713 F.2d 504, 508 n.2 (9th Cir. 1983) (in applying "the law of the place where the act or omission occurred" pursuant to section 1346(b), the whole law "including the choice of law principles" apply) (citing *Richards*, 369 U.S. at 11). We agree instead with Judge Scalia's conclusion that this choice-of-law dilemma evidences "that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties." *Beattie*, 756 F.2d at 111 (Scalia, J., dissenting).

[6] In a case arising out of an act occurring in the United States Embassy in Bangkok, we held that the foreign country exception precluded the action, adding by way of obiter that: "No authority has been cited indicating that it is the duty of the federal courts to create rules governing liability for tortious acts and omissions on the premises of American embassies and consulates abroad . . . and obviously our embassy at Bangkok has no tort law of its own." *Meredith*, 330 F.2d at 10 (citations omitted). Likewise, while the United States conducts activity in Antarctica, both through instrumentalities of space and defense agencies and through private contractors who employ workers and provide for on-the-job injuries, we have been cited to no legislative history which suggests that the federal courts should create substantive or choice-of-law rules governing liability for tortious acts and omissions in Antarctica.

III

[7] Even if we were to adopt the view that Antarctica is not a foreign country, we still could not agree that the coverage of the FTCA extends to Antarctica. The FTCA was, and remains, a limited relinquishment by Congress of the common law immunity the United States enjoyed from tort claims. If the search for legislative intent begins with the objective of enlarging the pool of solvent defendants for plaintiffs who think "someone ought to pay" for a particular loss, then the focus of the dissent on Oregon tort law would favor extraterritoriality in cases such as this. If however, the search for legislative intent begins where it started, with sovereign immunity, then it is difficult to reach the conclusion that Congress intended to apply state tort law to claims against the government arising out of governmental presence in Antarctica. At least such intent is far from explicit.

IV

In sum, we are not persuaded that Congress intended to waive immunity for alleged torts occurring in Antarctica, and accordingly we do not need to reach other questions that might arise if the district court had denied the motion and allowed the case to proceed to another stage of litigation.

The decision of the district court to dismiss this case for lack of subject matter jurisdiction is

AFFIRMED.

FLETCHER, Circuit Judge, dissenting:

The majority concludes that Antarctica, a "sovereignless region without civil tort law," *ante* at 16934, represents a foreign country for purposes of the Federal Tort Claims Act (FTCA), and hence that plaintiff Sandra Jean Smith's suit is barred by Section 2680(k) of the Act, under which the United States has retained its sovereign immunity against claims "arising in a foreign country." 28 U.S.C. § 2680(k) (1982). I respectfully dissent because the majority pays insufficient attention to the purposes underlying the FTCA and its foreign country provision and ignores the sound reasoning of the D.C. Circuit in *Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984), the only other circuit court case to address the FTCA's applicability to claims arising in Antarctica.

I agree with the majority that since Congress did not define what it meant by the term "foreign country" in enacting Section 2680(k), "we must ascertain a definition for 'foreign country' that is compatible with the context and purpose of the FTCA." *Ante* at 16936. After correctly identifying the task at hand, however, the majority devotes not a single line to a consideration of the FTCA's purpose or that of its foreign country provision. It instead focuses on two other provisions of the FTCA which it asserts would be rendered "nonsensical," *ante* at 16936, were we to hold that the district court enjoyed subject matter jurisdiction over the plaintiff's claims in this case. The majority's approach causes it to overstate greatly the implications of construing Antarctica as something other than a foreign country and leads it to a conclusion inconsistent with the fundamental underpinnings of the FTCA.

I.

Congress' purpose in enacting the FTCA is evident from the terms of the statute. "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1982). As this language makes clear, the FTCA was "designed primarily to remove the sovereign immunity of the United States . . . [and] to render the Government liable in tort as a private individual would be . . . ." *Richards v. United States*, 369 U.S. 1, 6 (1962); *see also Rudelson v. United States*, 602 F.2d 1326, 1333 (9th Cir. 1976). Congress sought to create in the federal government a responsibility for its actions akin to that borne by the average citizen.

In certain contexts, however, Congress was unwilling to subject the United States to liability in tort. Thus, in Section 2680(k), it declined to waive the federal government's immunity with respect to claims arising in foreign countries. The reasoning underpinning this exception to the FTCA's general waiver of sovereign immunity was explained by the Supreme Court in *United States v. Spelar*, 338 U.S. 217 (1949), its only decision to address Section 2680(k). "In brief, though Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 221 (1949).

In accordance with its desire to render the government's tort liability coextensive with that of a private individual, Congress provided in the FTCA that the district courts have jurisdiction over actions against the United States in circumstances where the government, "if a private person, would be liable to the claimant in accordance with the law of the place

where the act or omission occurred." 28 U.S.C. § 1346(b) (1982). If not limited, the FTCA's invocation of the law of the place where a tort occurs, could extend the district courts' jurisdiction to claims arising out of the government's activities in other countries. The United States would find itself subject to liability under the laws of a foreign sovereign, a result which Congress understandably desired to avoid. It was for this reason, as the Supreme Court recognized in *Spelar*, that Congress enacted Section 2680(k). This circuit has reiterated *Spelar*'s understanding of the foreign country exception on numerous occasions. *See, e.g, Cominotto v. United States*, 802 F.2d 1127, 1129 (9th Cir. 1986) ("Th[e] [foreign country] provision was included because Congress did not want to subject the United States to suits under the laws of foreign powers."); *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964); *Cobb v. United States*, 191 F.2d 604, 609 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952); *see also Beattie*, 756 U.S. at 196.

In this case, however, the plaintiff has not sued the government on the basis of actions taking place in a country that possesses a civil tort law of its own. As the majority recognizes, Antarctica is a sovereignless territory that has no legal system. Thus we are presented with a situation in which an American plaintiff has sued her government because of its activities in a region that has no independent body of legal principles which might govern the suit. Congress' concern, evidenced in Section 2680(k), that extending the FTCA's waiver of sovereign immunity to claims arising in foreign countries would subject the federal government to the laws of those countries simply is not implicated under these circumstances. And, as the majority recognizes, nothing in the language of Section 2680(k) itself dictates that a suit such as the present one be deemed barred. The principal purpose of the FTCA in establishing a liability for the United States akin to that of a private citizen should thus control our analysis. The question we should ask is whether an individual might be held liable for acts or omissions akin to those allegedly engaged in by the

government and its employees in this case. This is a question which the majority never reaches.

II.

Without ever considering the purposes of the FTCA or of its foreign country exception, the majority determines that Section 2680(k)'s reservation of sovereign immunity necessarily must extend to claims arising in Antarctica. Any other conclusion, it declares, would render the FTCA's venue and choice of law provisions senseless. This is simply not so. The majority correctly notes that the FTCA's venue clause provides that "a tort claim against the United States 'may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.' " *Ante* at 16937 (quoting 28 U.S.C. § 1402(b) (1982)). This provision, the majority declares, would make no sense were we to hold that Antarctica is not a foreign country for purposes of Section 2680(k). For in that case a plaintiff who did not reside in a judicial district within the United States would have no venue for a claim against the government for tortious conduct in Antarctica, even though the government had waived its sovereign immunity to suit for such a tort.

While it is certainly true that if a non-resident of the United States filed a tort claim against the United States arising from its actions in Antarctica, she would not be able to obtain venue pursuant to Section 1402(b), that fact alone does not justify reading Section 2680(k) so as to preclude all suits against the government that stem from its activities in Antarctica. No legal principle I know of guarantees that a plaintiff who can assert a claim over which a federal court would enjoy subject matter jurisdiction is entitled to a forum in which to bring suit. As the Supreme Court noted in *Brunette Machine Works v. Kockum Industries*, 406 U.S. 706, 710 n.10 (1972), throughout the history of our judicial system there have existed situations "in which the federal courts have juris-

diction but there is no district in which venue is proper." These situations are not frequent, nor are they favored. But the possibility that a gap between subject matter jurisdiction and venue might exist simply does not warrant reading a statute so as to eliminate jurisdiction over a class of cases altogether. Those who have no problem with venue should not be foreclosed from bringing suit simply because others cannot, particularly with respect to a statute such as the FTCA the primary purpose of which, as we have seen, was to expand the jurisdiction of the federal courts.

The FTCA's venue provision poses no difficulties in the present case. Plaintiff Smith resides in Oregon. Under the explicit terms of Section 1402(b), then, she can file suit in the District of Oregon. She should not be prevented from doing so by a reading of the statute predicated on neither its language nor its purpose, but only on the possibility that in what is surely an extremely limited number of cases a resident of a non-United States jurisdiction claiming to have been injured by the activities of the United States government in Antarctica will be unable to obtain venue for her action.

Similarly, the choice of law provision contained in Section 1346(b) of the FTCA does not support the majority's determination that Antarctica is a foreign country for purposes of Section 2680(k). Section 1346(b) requires courts to apply the whole law of the place where a negligent governmental act occurs, including that place's choice of law rule. *See Richards v. United States*, 369 U.S. 1 (1962); *Beattie*, 756 F.2d at 104. Antarctica, of course, possesses no such law, and the majority quickly draws from this fact the conclusion " 'that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties.' " *Ante* at 16938 (quoting *Beattie*, 756 F.2d at 111 (Scalia, J., dissenting)). As the *Beattie* court observed, however, Antarctica presents "a situation *directly opposite* to the fear of becoming entangled in foreign law, which produced the 'foreign country' exception. Hence . . . we do not

feel that the logical conclusion to be derived therefrom is that the entire case ought to be dismissed." 756 F.2d at 105 (emphasis in original). That Antarctica is a sovereignless territory devoid of civil law does not present this Court with only those options considered by the majority — developing our own substantive and choice of law rules to determine the government's liability for torts committed in the region or of dismissing suits for such liability altogether. If we keep in mind the primary purpose of the FTCA, a third alternative comes to the fore. To determine whether the district court enjoyed subject matter jurisdiction over the plaintiff's claims in this case we must consider what the liability of an individual citizen would be under like circumstances. This is an inquiry which is likely to point us in the direction of well-understood common law principles. Thus we return to the question of private liability, an issue never considered by the majority.

III.

If this case involved a private defendant, a court likely would apply the choice of law rule of the forum state, Oregon, in ascertaining the principles of law that should govern its determination of liability. No other state has a closer connection to Ms. Smith's claim than Oregon, the state of her residence. Oregon, furthermore, contains the only federal judicial district in which venue over the plaintiff's action is proper. Because Antarctica has no tort law, there exists no conflict of laws in this case, and hence Oregon's choice of law rule likely would counsel the application of Oregon substantive law to this dispute.

Furthermore, no policy or principle would prevent Oregon from applying its tort law in this fashion. Oregon's capacity to apply its law extraterritorially depends, in the first instance, on the capacity of the United States to do so. While nations generally apply their law based on territorial jurisdiction, nationality is another well-recognized basis for asserting juris-

diction. In Justice Holmes' words, "in regions subject to no sovereign, like the high seas, ... countries may treat some relations between their citizens as governed by their own law ...." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909). In other words, where it would not interfere with the sovereignty of another nation, the United States can apply its law based on the nationality of the parties involved.

This approach accords with the Restatement (Third) of the Foreign Relations Law of the United States (1987) [Restatement]. According to the Restatement, a country may exercise jurisdiction to prescribe, adjudicate, and enforce its law based on the parties' nationality, subject to the requirement that such an exercise of jurisdiction is reasonable. Restatement §§ 402, 421, 431. American courts, and this Court in particular, have identified comity as the central principle behind the reasonableness requirement. *See* Restatement § 403 comment (a) (citing *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976)). It would thus be reasonable for the United States to exercise jurisdiction over a tort claim involving its nationals in Antarctica, because no other nation would have a basis for jurisdiction, and as a result the principle of comity would not be disturbed.

Where the United States can apply its law extraterritorially, an individual state such as Oregon may do the same so long as it does not run afoul of the constitutional principle of federalism. In *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398 (1907), the Supreme Court held that Delaware could apply its wrongful death statute to a claim for death on the high seas, on the ground that both of the parties involved were Delaware corporations. The Court noted that "the bare fact of the parties being outside the territory, in a place belonging to no other sovereign, [does] not limit the authority of the state ...." *Id.* at 403. Oregon similarly has the authority to apply its tort law to a claim that has been brought by one of its residents concerning injuries sustained in an accident in Antarctica, a place which like the high seas belongs to no other sovereign.

Oregon could thus legitimately apply its tort law to a claim akin to plaintiff Smith's if the defendant were a private individual or entity. Whether the state would actually do so is, of course, a question of state law. It is substantially the same question as that which confronts a district court in every FTCA suit: Would a private individual be liable under like circumstances? I believe that this is the question we should pose to the district court on remand in order that it determine whether Ms. Smith is entitled to pursue her claim against the United States for the death of her husband. We should not affirm the district court's dismissal for lack of subject matter jurisdiction.

As the D.C. Circuit noted in *Beattie*, "we [would] have a no-man's land of law in Antarctica, unless United States law covers the actions of United States citizens — not an unfair concept — and United States law includes the Federal Tort Claims Act ... [U]nless this concept is accepted, Antarctica is an area without any law whatsoever." 756 F.2d at 105-06. The majority's decision in this case essentially renders lawless a region where many of our citizens live and work. Since neither the language of the FTCA nor its underlying principles justify this result, I respectfully dissent.

Sandra Jean SMITH, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 87-883-FR.

United States District Court, D. Oregon.

Jan. 6, 1989.

OPINION

FRYE, District Judge.

In the matter before the court, defendant, United States of America, moves the court for an order dismissing plaintiff, Sandra Jean Smith's, complaint pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure on the basis that the court lacks jurisdiction over the subject matter of the action.

BACKGROUND

The agreed facts are set forth in Exhibit A of the Pretrial Order attached hereto.

Plaintiff brings this wrongful death action invoking the court's subject matter jurisdiction pursuant to the Federal Torts Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. (FTCA). Plaintiff asserts that the United States negligently caused her husband's death by failing to adequately warn

him that there were dangerous crevasses in areas off the flagged paths.

[1] In order to establish jurisdiction under the FTCA, plaintiff has the burden to demonstrate that her case falls within the parameters described by 28 U.S.C. § 1346(b) and that it does not fall within any of the FTCA's exceptions to the limited waiver of sovereignty by the United States.

The United States asserts that this court does not have subject matter jurisdiction over plaintiff's claim which arose in Antarctica because 1) the FTCA was meant to apply only within the territorial jurisdiction of the United States; 2) Antarctica is a "foreign country" as that term was used by Congress when it explicitly retained the government's sovereign immunity for

"[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k); and 3) plaintiff cannot demonstrate "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), because Antarctica has no civil law.

Plaintiff asserts that the FTCA was intended to apply to a foreign country without a government and without laws, and that the FTCA does not limit the liability of the United States to acts occurring within the territorial boundaries of the United States.

ANALYSIS AND RULING

The FTCA acts as waiver of sovereign immunity in specified types of cases. Section 2680 of the FTCA lists several exceptions to that waiver. Section 2680 provides that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to ... (k) [a]ny claim arising in a foreign country." Plaintiff's claim arose in Antarctica and is barred if Antarctica is a "foreign country" within the meaning of the FTCA.

[2] The provision against the extraterritorial application of the FTCA in section 2680(k) is consistent with an important canon of statutory construction that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). The presumption against the extraterritorial application of a statute is not absolute in that it can be overcome by "a clear expression of congressional intent." *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir.1977); *see also Foley*, 336 U.S. at 285, 69 S.Ct. at 577.

In *Meredith v. United States*, 330 F.2d 9 (9th Cir.1964), the court held that an action arising from acts and omissions which occurred within the physical confines of the American Embassy at Bangkok, Thailand was barred by the foreign country exception in section 2680(k). The Ninth Circuit

stated that "[t]he phrase 'in a foreign country' is used in section 2680(k) with the meaning dictated by 'common sense' and 'common speech.'" *Meredith*, 330 F.2d at 11 (citations omitted). The court stated that the appellant's position that the FTCA was intended to extend to persons injured on premises occupied by foreign embassies and consulates of the United States is "incompatible with the rule that, in the absence of an indication to the contrary, legislation is intended to apply 'only within the territorial jurisdiction of the United States.'" *Meredith*, 330 F.2d at 11 (citations omitted).

[3, 4] This court finds nothing in the FTCA that would indicate that Congress intended for the FTCA to apply to acts or omissions which arose in Antarctica. The common sense and common speech meaning of the phrase "in a foreign country" used in section 2680(k) includes Antarctica in that it is not within the territorial jurisdiction of the United States. There is no

indication that Congress intended to exclude from the common sense meaning of the phrase "in a foreign country" regions that while not within the territorial jurisdiction of the United States, are not under the domination of another foreign nation or country, assuming for the sake of argument that Antarctica can be considered to be governless.

Furthermore, to apply the FTCA to torts occurring in stateless foreign regions would lead to unnecessary inconsistencies within the provisions of the FTCA itself. The choice of law provision of the FTCA reads, in relevant part, as follows:

> [T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States ... under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*

28 U.S.C. § 1346(b) (1982) (emphasis added).

The Supreme Court has made clear that a court should apply this language precisely as it appears:

> In the Tort Claims Act Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred, and we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act.

Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492, (1962) (footnote omitted).

[5] To adopt the plaintiff's position would require this court to apply the civil law of Antarctica which has no civil law to apply. This court would then have to bypass the "precise language," *Richards*, 369 U.S. at 9, 82 S.Ct. at 591, of Congress and apply the law of a place where all parties acknowledge the negligence did *not* occur.

This court acknowledges that the Circuit Court for the District of Columbia reached a contrary conclusion in *Beattie v. United States*, 756 F.2d 91 (D.C.Cir.1984), holding that the exception in section 2680(k) applies only where "the government of a foreign nation has or asserts sovereignty" and not to Antarctica which "is not a country at all." *Beattie*, 756 F.2d at 94. However, this court concludes that the precedent set in *Meredith* supports the dissenting opinion in *Beattie*. The *Meredith* case supports the conclusion that section 2680(k) is properly interpreted to limit the application of the FTCA to the territorial jurisdiction of the United States. *Meredith*, 330 F.2d at 11. This interpretation is dictated by the fact that there is no clear expression of congressional intent in the FTCA to apply the legislation outside of the territorial boundaries of the United States, and it avoids the creation of internal inconsistencies within the precise language of the statute.

The United States's motion to dismiss on the grounds that this court lacks subject

matter jurisdiction over this action is granted.

EXHIBIT A

The following facts are agreed to by the parties and require no further proof:

1. Plaintiff resides at 14222 N.E. Milton, Portland, Oregon.

2. Plaintiff Sandra Jean Smith is the widow of and the duly appointed personal representative of the estate of John Emmett Smith, deceased (sometimes referred to as "decedent").

3. Prior to filing suit, plaintiff Sandra Jean Smith timely presented an administrative claim to the appropriate federal agency in her capacity as personal representative of the estate of John Emmett Smith.

4. Plaintiff's administrative claim was finally denied by the agency in writing on or about July 13, 1987.

5. Plaintiff commenced suit within six months after the date of mailing of the letter denying the administrative claim she had filed.

6. Plaintiff's complaint seeks money damages on behalf of her husband's estate for his personal injury and death.

7. Commencing on or about October 21, 1986, decedent was employed by ITT Antarctic Services, Inc. ("ITT/ANS"), as a carpenter.

8. Mr. Thomas Powell and Mr. Matthew Kaz were also employed by ITT/ANS.

9. Decedent was assigned by ITT/ANS to help construct buildings at McMurdo Station, which is on Ross Island, Antarctica.

10. Decedent arrived at McMurdo Station, Antarctica, on October 27, 1986.

11. Mr. Powell and Mr. Kaz also arrived at McMurdo Station, Antarctica, on October 27, 1986.

12. Upon arrival at McMurdo Station on October 27, 1986, Mr. Smith, Mr. Powell, and Mr. Kaz attended an indoctrination briefing. The speakers at the briefing were Art Brown, an employee of ITT/ANS, and David M. Bresnahan, an employee of the National Science Foundation ("NSF").

13. At the briefing, Mr. Brown and/or Mr. Bresnahan noted that Antarctica is a dangerous place, and that it was important to remember that fact and not to be lulled into a sense of security.

14. The briefing also covered, among other topics, the requirement to file a foot plan when participating in off-base recreational travel.

15. The National Science Foundation and the Department of the Navy are agencies of the United States and their employees are federal employees for purposes of the FTCA.

16. ITT Antarctic Services, Inc., is not an agency of the United States and its employees are not federal employees for purposes of the FTCA.

17. The United States maintains a presence in Antarctica responsive to the United States' scientific, economic, and political objectives.

18. The NSF has responsibility for the United States' research effort in Antarctica. In 1959 it established the U.S. Antarctic Research Program ("USARP"). Budgetary responsibility for the program, including the funding of logistic support activities, rests with the NSF.

19. The NSF draws upon the logistic support capabilities of the Department of the Navy in operating the United States Antarctic Research Program.

20. The NSF has contracted with ITT/ANS for construction and other specialized functions at McMurdo Station, as well as for services at other locations in Antarctica.

21. McMurdo Station is the primary logistics facility for airborne resupply of inland stations and for USARP field science projects in Antarctica.

22. Both the United States Navy and ITT/ANS provide various services and operate and maintain facilities and utilities at McMurdo Station and its airfield, Williams Field.

23. Castle Rock is located outside McMurdo Station.

24. The Castle Rock hike route and the area where Mr. Smith fell into a crevasse were not depicted on the map posted outside the galley.

25. The United States neither owns nor exercises sovereignty over the area where Mr. Smith fell into a crevasse.

26. One of the contractual conditions of Mr. Smith's employment with ITT/ANS required him to comply with all laws and regulations, both civil and military, applicable at the work site and the vicinity thereof.

27. One of the conditions applicable to Mr. Smith and his hiking companions was compliance with "COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2," which sets forth off-base travel procedures in Antarctica.

28. Off-base recreational travel governed by "COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2," includes travel to Castle Rock.

29. Mr. Smith and his companions Mr. Powell and Mr. Kaz took a recreational hike to Castle Rock on November 23, 1986.

30. The hike to Castle Rock was marked by a flagged route. There were no black flags on or off the flagged route.

31. Mr. Smith and his companions filed a foot plan as required by "COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2."

32. Mr. Smith and his companions did not seek nor did they obtain permission to deviate from the flagged route to Castle Rock.

33. No signs are posted at the beginning of the flagged route to Castle Rock, or along the path, advising hikers not to leave the flagged route and/or that there were crevasses in the area if they travelled off the flagged route.

34. On their way to Castle Rock, Mr. Smith and his companions hiked along the flagged route.

35. Mr. Smith and his companions hiked along the flagged route part of the way back to McMurdo Station. Then they broke away from the flagged route to hike

across a snow field in the direction of Scott Base.

36. Scott Base is a New Zealand base which is located near to McMurdo Station.

37. Sometime after deviating from the flagged route, Mr. Smith and his companions reached an area where the downward slope of the ground was about 10–15 degrees. They crossed an obvious crack in the snow which was solidly filled in. This was a crevasse. Mr. Kaz warned Mr. Smith and Mr. Powell to be careful of such cracks.

38. While walking across the unflagged snow field, Mr. Smith and Mr. Powell dropped into snow above their knees, but this did not cause them to turn back or return to the flagged route.

39. Mr. Smith and his companions did not walk in single file while walking across the snow field.

40. Mr. Smith and his companions did not rope themselves together while walking across the snow field.

41. Mr. Smith and his companions did not encounter any other hikers walking across the snow field. Nor did they see any footprints in the snow.

42. After stopping for a snack, Mr. Kaz took a step and suddenly disappeared from sight.

43. Mr. Smith then took another step and he disappeared from sight.

44. Both Mr. Kaz and Mr. Smith had fallen into a crevasse.

45. Mr. Smith died from exposure and/or internal injuries suffered as a result of the fall.

(2)

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

No. 91-1538

In the Supreme Court of the United States

OCTOBER TERM, 1991

SANDRA JEAN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
MARK B. STERN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the waiver of sovereign immunity contained in the Federal Tort Claims Act extends to acts or omissions occurring in Antarctica.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1538

SANDRA JEAN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 953 F.2d 1116. The opinion of the district court (Pet. App. 18-33) is reported at 702 F. Supp. 1480.

JURISDICTION

The court of appeals first issued its decision on May 1, 1991. The court of appeals issued a second opinion and withdrew its first opinion on December 24, 1991. A petition for rehearing was denied on December 24, 1991. Pet. App. 3. The petition for a writ of certiorari was filed on March 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the widow of John Emmett Smith. At the time of his death, Mr. Smith worked at McMurdo Naval Air Station, Antarctica, for a construction company under contract with the National Science Foundation.

Upon his arrival in Antarctica in October 1986, Mr. Smith attended an orientation briefing at which he was informed, *inter alia*, that Antarctica is a dangerous place and that foot plans had to be filed whenever individuals chose to participate in off-base recreational travel. Pet. App. 27-28. On November 23, 1986, Mr. Smith and two companions took a recreational hike to Castle Rock, located several miles outside of McMurdo Station. As required by applicable regulations, Mr. Smith and his companions filed a foot plan prior to their trip. The plan did not seek or obtain permission to deviate from the flagged route to Castle Rock. Pet. App. 30-31.

Mr. Smith and his companions followed the flagged route on their way to Castle Rock and for part of their return hike. They then departed from the flagged route to hike across a snow field in the direction of Scott Base, a New Zealand base located near McMurdo Station. Although Mr. Smith and one of his companions dropped into snow above their knees, they continued onward. Pet. App. 31-32.

After the three men had stopped for a snack, one of them took a step and suddenly dropped from sight. Mr. Smith then took a step and he, too, disappeared. Both men had fallen into a crevasse. Despite the efforts of American and New Zealand search and rescue personnel, Mr. Smith died from a combination of exposure and internal injuries suffered as a result of the fall. Pet. App. 33.

The United States neither owns nor exercises sovereignty over the area in which the accident

occurred. Pet. App. 30. New Zealand has asserted sovereign claims to that area, as well as to the area where McMurdo Station is located; those claims are not recognized by the United States. See generally *Beattie* v. *United States*, 756 F.2d 91, 107 (D.C. Cir. 1984) (Scalia, J., dissenting).

2. Petitioner filed this wrongful death action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, alleging that the United States had negligently failed to provide adequate warning of the dangers posed by crevasses in areas not on flagged paths. Petitioner based her claim exclusively on acts or omissions occurring in Antarctica, not on conduct in the United States. See Pet. App. 5 n.3.

The district court dismissed for lack of subject matter jurisdiction. Pet. App. 18-33. The court held that petitioner's claims were barred by the FTCA's specific exception for "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k); Pet. App. 20-26.

3. The court of appeals affirmed. Pet. App. 1-17. The court noted that the term "foreign country" is capable of different meanings, and looked to the language and structure of the FTCA in determining whether Antarctica should be treated as a foreign country under that statute. Pet. App. 5-6. The court first observed that the FTCA's venue provision permits tort suits to be prosecuted against the United States "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," 28 U.S.C. 1402(b), and concluded that permitting FTCA suits for claims arising in Antarctica would lead to the anomalous result that non-residents of the United States would have a cause of action for Antarctic injuries but no venue in which to bring it. Pet. App. 7-8. The court found it "unlikely that Congress intended to create a tort remedy in cases for which no venue exists." *Id.* at 8.

The court also relied on the FTCA's choice-of-law provision, which makes the United States liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Noting that Antarctica has no tort law at all, the court concluded "that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties." Pet. App. 8 (quoting *Beattie* v. *United States*, 756 F.2d 91, 111 (D.C. Cir. 1984) (Scalia, J., dissenting)).

The court held in the alternative that, even if Antarctica were not properly characterized as a "foreign country" for purposes of the FTCA, petitioner's suit would nonetheless be barred. The court reasoned that the FTCA was "a limited relinquishment by Congress of the common law immunity the United States enjoyed from tort claims," and held that the absence of any evidence of congressional intent to subject the United States to liability for claims arising in Antarctica precluded petitioner's suit. Pet. App. 9.

The court recognized that in *Beattie* v. *United States*, 756 F.2d 91 (1984), a divided panel of the District of Columbia Circuit had reached a contrary conclusion. However, the court noted its agreement "with the approach and conclusions of then Judge Scalia," who dissented in *Beattie*. Pet. App. 6.

Judge Fletcher dissented. Judge Fletcher reasoned that the purpose of the foreign-country exception was to ensure that the United States would not "find itself subject to liability under the laws of a foreign sovereign." Pet. App. 12. In her view, that underlying purpose would not be frustrated by permitting suits for injuries occurring in Antarctica, because Antarctica has no law to apply. *Ibid.* Instead, Judge Fletcher concluded that the court could properly apply the law of Oregon (the forum State and the State of petitioner's residence). *Id.* at 15.

ARGUMENT

1. Petitioner contends (Pet. 4-11) that the FTCA is applicable to claims arising in Antarctica because Antarctica is not "a foreign country" within the meaning of the FTCA. The court of appeals correctly rejected that contention.

The FTCA, which waives the federal government's immunity from suit in a limited category of cases, does not apply to "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k). "The words 'foreign country' are not words of art," and are used in Section 2680(k) "with the meaning dictated by 'common sense' and 'common speech.'" *Meredith* v. *United States*, 330 F.2d 9, 10-11 (9th Cir.), cert. denied, 379 U.S. 867 (1964). As then-Judge Scalia's dissent observed in *Beattie* v. *United States*, 756 F.2d 91, 109 (D.C. Cir. 1984), "[t]he first dictionary meaning of 'country' is not 'sovereign state' but simply 'region,'" and the "first definition of 'foreign' is 'situated outside a place or country; *esp.* situated outside one's own country.'" Moreover, this meaning of "foreign country" was invoked during the congressional discussions of the Antarctica Treaty. See *The Antarctic Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess. 39, 61 (1960) (statement of Sen. Aiken) ("If this agreement is approved, Antarctica becomes a country without a government."), quoted in *Beattie*, 756 F.2d at 110 (Scalia, J., dissenting).

The legislative history of Section 2680(k) provides further support for the conclusion that Antarctica is a "foreign country" for purposes of the FTCA. Testifying in 1942 as to the provision later adopted as Section 2680(k), Assistant Attorney General Francis M. Shea explained:

> Claims arising in a foreign country have been exempted * * * whether or not the claimant is an alien.

> Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise *to restrict the bill to claims arising in this country*. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.

Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary, 77th Cong., 2d Sess. 35 (1942) (emphasis added). See also *United States* v. *Spelar*, 338 U.S. 217, 221 (1949) (quoting testimony). This testimony reveals that the drafters of Section 2680(k) thought it would "restrict the [FTCA] to claims arising in this country," and demonstrates that "foreign country" was not used as a term of art but was instead used in contradistinction to "*this country*." As a matter of common sense and common usage, therefore, Antarctica is a "foreign country" within the meaning of the FTCA even though it is not a sovereign state with its own system of laws.

As the court of appeals observed, moreover, reading the FTCA in the manner proposed by petitioner would create insurmountable conflicts with other provisions of the statute. In the first place, petitioner's interpretation of Section 2680(k) would make the United States liable in foreign regions where there is no law to apply, but 28 U.S.C. 1346(b) makes the United States liable only when "the law of the place where the act or omission occurred" would impose liability on private persons.

In addition, 28 U.S.C. 1402(b), which establishes venue "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," clearly contemplates application of the FTCA only in the United States and its territories. A contrary reading would in effect limit the availability of Antarctic FTCA claims to United States residents, a limitation nowhere contemplated by the statute, which does not incorporate

United States residency as a prerequisite to suit. As the court of appeals recognized, there is no reason to create statutory cacophony where none exists, or to undertake the impermissible task of imposing liability on the United States in a manner not clearly contemplated by the terms of the FTCA's limited waiver of sovereign immunity. See *United States Dep't of Energy* v. *Ohio*, No. 90-1341 (Apr. 21, 1992), slip op. 5 ("any waiver of the National Government's sovereign immunity must be unequivocal," and " '[w]aivers of immunity must be "construed strictly in favor of the sovereign" and not "enlarge[d] . . . beyond what the language requires" ' ") (citations omitted).

2. Even if there were some remaining doubt about the question, the general presumption against extraterritorial application of congressional statutes would foreclose petitioner's attempt to apply the FTCA to claims arising in Antarctica. "[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)); accord *United States* v. *Spelar*, 338 U.S. 217, 222 (1949). As the Court explained in *Arabian American Oil Co.*, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." 111 S. Ct. at 1230. Thus, the presumption against extraterritorial application controls "unless there is 'the *affirmative intention* of the Congress *clearly expressed*' " to extend the reach of the statute beyond the Nation's borders. *Ibid.* (emphasis added).

The explicit exclusion from the FTCA of torts arising in foreign countries does not demonstrate congressional intent to provide for extraterritorial application. To the contrary, as the Court stated in *United States* v. *Spelar*, "[t]hat presumption, far from being overcome here, is

doubly fortified by the language of this statute and the legislative purpose underlying it." 338 U.S. at 222 (holding that tort claims arising at United States Air Force Base in Newfoundland fell within the scope of Section 2680(k)). See also *Beattie*, 756 F.2d at 113 (Scalia, J., dissenting) ("even without the 'foreign country' exclusion it would be improper to interpret the FTCA as applying to acts or events in Antarctica. It is perverse to give the explicit exclusion of foreign claims the consequence of expanding the Act"). Since nothing in the FTCA suggests any affirmative congressional intent to subject the federal government to liability for claims arising outside the territorial boundaries of the United States, petitioner's claim was properly rejected.

3. Petitioner correctly contends (Pet. 5) that the court of appeals' decision squarely conflicts with *Beattie* v. *United States*, 756 F.2d 91 (D.C. Cir. 1984). Accordingly, the Court may wish to grant the petition to resolve the conflict. See Sup. Ct. R. 10.1(a). Nonetheless, this case does not, in our view, present the type of important and recurring question that necessitates resolution by this Court. Compare, *e.g.*, *Tomala* v. *United States*, cert. denied, No. 91-7051 (May 18, 1992); *Onofre* v. *United States*, cert. denied, 112 S. Ct. 648 (1991); *Young* v. *United States*, cert. denied, 112 S. Ct. 384 (1991).

We are presently unaware of any FTCA cases, other than *Beattie* and the decision below, that involve tort claims against the United States for injuries or conduct occurring in Antarctica. While it is no doubt possible that such claims will arise in the future, see *Beattie*, 756 F.2d at 130 (Scalia, J., dissenting), the fact that only two reported cases involving Antarctic FTCA claims have been decided in the decades since the FTCA was enacted suggests that the question presented in the petition is not one of immediate and substantial importance.

Moreover, if the issue ever arises again, the District of Columbia Circuit may well reconsider its holding in *Beattie*. In extending the FTCA to Antarctica, the *Beattie* majority found it "persuasive that Congress did not place a strict geographical limit on the scope of the FTCA, preferring simply to make an exception in the case of foreign countries." 756 F.2d at 95 (emphasis omitted). In essence, then, the *Beattie* majority gave the FTCA extraterritorial application largely because Congress did not clearly express a contrary intent. That approach, of course, is inconsistent with this Court's recent reinvigoration of the traditional rule that the presumption against extraterritorial application of legislation will not be overcome absent "the affirmative intention of the Congress clearly expressed." *Arabian American Oil Co.*, 111 S. Ct. at 1230. To be sure, the presumption against extraterritoriality existed before *Beattie*, but the *Beattie* majority did not even refer to it. Thus, this Court's renewed emphasis on the presumption might lead the District of Columbia Circuit to reexamine its decision in *Beattie* were the question to arise again.

4. Petitioner suggests (Pet. 5) that the Court's decision in *Lujan* v. *Defenders of Wildlife*, No. 90-1424 (argued Dec. 3, 1991), may have implications for the proper resolution of this petition. *Lujan* presents, *inter alia*, the issue whether Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), is applicable to activities in foreign countries. This Court's resolution of *Lujan* will not affect the decision below, however, because the court of appeals did not rely on the presumption against extraterritoriality in rejecting petitioner's claims. Instead, the court held that the language and structure of the FTCA itself precluded the interpretation urged by petitioner. Accordingly, there is no reason to hold this petition until *Lujan* has been decided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
ROBERT S. GREENSPAN
MARK B. STERN
Attorneys

MAY 1992

Supreme Court, U.S.
FILED
JUL 24 1992
OFFICE OF THE CLERK

(3)

No. 91-1538

In The

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October Term, 1991

SANDRA JEAN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

DAVID J. BEDERMAN
Counsel of Record
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall
Atlanta, Georgia 30322
(404) 727-6822

DAVID GERNANT
Of Counsel
One Main Place, Suite 1890
P.O. Box 23594
Portland, Oregon 97281

ALLEN T. MURPHY, JR.
Attorney for Petitioner
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97201

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QUESTION PRESENTED FOR REVIEW

Is Antarctica a "foreign country" for the purposes of the Federal Tort Claims Act?

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OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991, *Smith* v. *United States*, slip op. 16931 (9th Cir. Dec. 24, 1991), including the dissenting opinion of Judge Fletcher, is reported

at 953 F.2d 1116 (9th Cir. 1991), and is reprinted in the Appendix to the Petition for Certiorari ("Pet.App."), at 1.

The opinion and judgment of the U.S. District Court for the District of Oregon, Judge Frye, presiding, of January 6, 1989, was reported at 702 F. Supp. 1480 (D. Or. 1989), and is reprinted in Pet.App. 18.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of December 24, 1991. A Petition for Rehearing and Suggestion for Rehearing En Banc were both denied on that same date. *Smith* v. *United States*, 953 F.2d 1116, slip op. at 16933 (9th Cir. Dec. 24, 1991); Pet.App. 3. This Court granted the Petition for Certiorari on June 15, 1992. The Supreme Court has jurisdiction to review cases from the federal Courts of Appeals by virtue of 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

The Federal Tort Claims Act, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)), excludes from its jurisdiction "[a]ny claim arising in a foreign country." *Id.* § 2680 (codified at 28 U.S.C. § 2680(k) (1988)).

STATEMENT OF THE CASE

A. The Facts

The Petitioner, Sandra Jean Smith, is the widow of John Emmett Smith, and the duly appointed representative of his estate. *See* Exhibit A of Agreed Facts ("Agreed Facts"), *Smith* v. *United States*, 702 F.Supp. 1480, 1483 (D. Or. 1989), at ¶ 2; Pet.App. 26. Mr. Smith was a carpenter by trade, and was employed by ITT Antarctic Services, a firm which provides logistic support for U.S. operations in the Antarctic. Mr. Smith arrived at McMurdo Station, Antarctica, on October 27, 1986, and began work in building some structures at the Station, which is exclusively operated by the United States government. *Id.* ¶¶ 7, 9, 12, 15-22; Pet.App. 27-29.

On November 23, 1986, Mr. Smith and two companions took a recreational hike to a site near McMurdo Station. The party wandered off a marked route. Mr. Smith fell into a crevasse and was killed. *Id.* ¶¶ 29-45; Pet.App. 30-33.

B. The Geographic and Political Setting

Antarctica is, quite literally, the last place on earth. Constituting about ten percent of the world's land and water area, the Antarctic region is a great wilderness -- remote, desolate, sublimely beautiful, and implacably hostile to the very limited human activities there.[1] Antarctica is,

[1] The Antarctic land mass of approximately 13.5 million square miles is mostly covered by an ice sheet up to more than two miles thick. Less (continued...)

nonetheless, vitally significant as the climatological engine for global weather patterns, as an extraordinarily diverse ecosystem (on the coast and in the Antarctic (or Southern) Ocean), and as a platform for important physical and biological research.

The hallmark of United States policy towards the Antarctic has been to maintain it as a place for science. To this end, the United States has led in the development of the Antarctic treaty régime, which currently regulates virtually every aspect of the human presence on the Southern continent. The cornerstone of this system is the Antarctic Treaty, signed at Washington, on December 1, 1959. *See* 12 U.S.T. 795, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (entered into force June 23, 1961) (hereinafter "Antarctic Treaty"). Provisions of the Antarctic Treaty will be referred to in detail in this brief, but it is helpful to recall here that the purpose of the Treaty is to ensure that the Antarctic region will be "used exclusively for peaceful purposes." *Id.* preamble cl. 1; art. 1, para. 1. The Treaty guarantees and promotes international scientific cooperation, *id.* arts. 2 & 3, requires the total demilitarization of the area, *id.* arts. 1 & 5, and allows complete freedom of movement in the region and the right of nationals of one country to visit the stations and installations of other countries. *Id.* arts. 7 & 8.

The Antarctic Treaty of 1959 has since been supplemented by various other conventions, protocols, and recommendations. These cover such matters as

[1](...continued)
than two percent of the land is exposed. *See generally*, U.S. Congress, Office of Technology Assessment (OTA), *Polar Prospects: A Minerals Treaty for Antarctica* (1989).

comprehensive environmental protection,[2] facilitating logistical support for scientific bases,[3] promoting exchanges of scientific information,[4] and even coordination of postal services.[5] The entire thrust of the Antarctic legal régime, and of the United States policy that supports it, is to promote science and research in the Antarctic region without concern for territorial claims or sovereignty.

To this end, the United States has maintained an extraordinary presence in the Antarctic. Yankee sealers were likely among the first to sight, and then land upon, the Southern continent. Admiral Richard E. Byrd's five expeditions to Antarctica (between 1928 and 1958) had mapped nearly eighty percent of the continent. *See* OTA, *Polar Prospects*, at 38-40. These efforts culminated in the International Geophysical Year (1957-58), marking the beginning of planned, international scientific cooperation in the region, and which, in turn, impelled the negotiation and

[2] *See* Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, ATCP Doc. XI ATSCM/2, reprinted in 30 *Int'l Legal Materials ("I.L.M.")* 1461 (1991), and 4 *Geo. Int'l Env'tal L. Rev.* 111 (1991).

[3] Antarctic Treaty Consultative Parties, Recommendations I-X (July 24, 1961) (reaffirming "traditional Antarctic principle . . . to render all assistance feasible in the event of an emergency"), XIII-6 (Aug. 6, 1986) (regarding siting of stations), reprinted in 1 W. M. Bush, *Antarctica and International Law* 126 and 91-2 *id.* Release (Booklet AT2), at 49.

[4] *See id.* Recommendation VIII-6 (June 20, 1975) (annual exchanges of information), reprinted in 1 W. M. Bush, *Antarctica and International Law* 317.

[5] *See id.* Recommendation I-XII (July 24, 1961), reprinted in 1 W. M. Bush, *Antarctica and International Law* 127.

signing of the Antarctic Treaty.

Some twenty-two nations today participate in Antarctic science. The United States currently operates three year-round stations: McMurdo, Palmer, and Amundsen-Scott (at the geographic South Pole), with a combined population of over 1400. In addition, the United States maintains a few summer stations (Byrd and Siple), with about 60 personnel. *Id.* at 143-45. All told, United States nationals account for over half of all Antarctic summer residents.[6] The United States' Antarctic presence is coordinated by the National Science Foundation (NSF), with logistical support provided largely by the U.S. Navy. *See, e.g.*, Antarctic Conservation Act of 1978, 16 U.S.C. §§ 2402(4), 2405 (1988) (recognizing lead role of NSF in environmental permitting and regulation).

C. Prior Proceedings

The gravamen of Petitioner's suit against the United States, filed in the U.S. District Court in Portland, Oregon, on August 5, 1987, is that its agents, the civilian and military authorities which operate the McMurdo Station, failed to warn Mr. Smith of the dangers in deviating from flagged routes in any off-base travel. *Smith* v. *United States*, 702 F.Supp. 1480, 1481 (D. Or. 1989); Pet.App. 18-19.

The District Court, Frye, J., presiding, granted the United States' motion to dismiss the action on the ground that the court lacked subject matter jurisdiction under the Federal Tort Claims Act. 702 F. Supp. at 1482-83; Pet.App. 25-26. The U.S. Court of Appeals for the Ninth Circuit affirmed. *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931, at 16940 (9th Cir. Dec. 24, 1991); Pet.App. 10.

This Court granted the Petition for Certiorari on June 15, 1992.

[6] See *Environmental Impacts of U.S. Activities in Antarctica: Hearings on H.R. 3977, 4210 & 4514, before the Subcomms. on Coast Guard and Navigation, Fisheries and Wildlife Conservation and the Environment, and Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 2d Sess. 89, 92 (1990) (testimony of Bruce S. Manheim, Jr., Esq.).

SUMMARY OF THE ARGUMENT

This case presents the first opportunity for this Court to pass on the legal consequences of the activities of the United States in Antarctica. At issue here is the proper construction of the "foreign country" exception to the Federal Tort Claims Act (FTCA). The court of appeals ruled that Antarctica was a "foreign country" under the FTCA, thus barring Mrs. Smith's claim against the government for the wrongful death of her husband.

Petitioner submits that the phrase "foreign country" is not self-defining, but, rather, depends on the primary Congressional intent of insulating the United States from liability as imposed by foreign law. Antarctica is a sovereignless region under international law (to which the United States subscribes). It is a *terra nullius* belonging to no nation. A place without a sovereign can have no civil tort law of its own, and, therefore, the legislative goal of the FTCA's "foreign country" exception is not compromised by permitting claims to arise from Antarctica.

Sound policy is, moreover, served by allowing FTCA claims from the Southern continent. Since United States law does not otherwise treat citizens in the Antarctic as being in

a foreign country, it makes little sense to refuse their FTCA claims for that reason alone. The United States taxes citizens in Antarctica as if they were in the United States. It also exercises criminal jurisdiction over Americans there. If the United States taxes and punishes in the Antarctic, it is only right to construe the FTCA so as to allow claims when the government is negligent there. This result serves the interests of civilian scientists present in the Antarctic, the goal of free and unimpeded science being the cornerstone of U.S. polar policy.

By interpreting the FTCA to permit Antarctic claims, no violence is done to the choice of law and venue clauses of the Act, as the court below feared. Petitioner maintains that far from being intractable, the choice of law question raised in an FTCA claim, brought by a U.S. resident injured in the Antarctic, is straightforward. The law of the forum (typically the plaintiff's state of residence) would apply. This simple rule of decision reconciles the various provisions of the FTCA, while also remaining true to Congress's intent for the "foreign country" exception and the international legal status of Antarctica.

ARGUMENT

I.
ANTARCTICA IS NOT A "FOREIGN COUNTRY" FOR THE PURPOSES OF THE FEDERAL TORT CLAIMS ACT BECAUSE IT IS SOVEREIGNLESS AND HAS NO TORT LAW OF ITS OWN.

The Federal Tort Claims Act, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)) (hereinafter "the Act" or "FTCA"), excludes from its jurisdiction "[a]ny claim arising in a foreign country." *Id.* § 2680 (codified at 28 U.S.C. § 2680(k) (1988)). Nowhere in the Act, however, is the phrase "foreign country" defined.

The U.S. Court of Appeals held in the decision below, *Smith* v. *United States*, 953 F.2d 1116, slip op. 16931 (9th Cir. Dec. 24, 1991), that the United States has not waived immunity from suits brought for the government's acts or omissions in the Antarctic. *Id.* at 1117, 1120; slip op. at 16934, 16940; Pet.App. 4, 10. The Court of Appeals concluded that Antarctica is a "foreign country" for the purposes of the Federal Tort Claims Act, 28 U.S.C. § 2680(k), the sole avenue by which the Petitioner may sue the United States for the wrongful death of her husband. Petitioner submits that the reasoning adopted by the Ninth Circuit defies precedent, perverts the clear language of the statute, and undermines the intent and purpose of the Federal Tort Claims Act.

A. "Foreign Country" is not a Generic Phrase in the FTCA.

1. The phrase "foreign country" recurs with startling regularity in the Acts of Congress. And, despite pronouncements to the contrary,[7] it has defied ready definition. Instead, as has been noted by this Court, "[t]he term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation." *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 5-6 (1932); *accord Straneri* v. *United States*, 77 F. Supp. 240, 241 (E.D. Pa. 1948).

In *Burnet*, this Court confirmed that the word "country" in "foreign country" is capable of two meanings.[8] 285 U.S. at 5-6. It can mean any place beyond the sovereignty of the United States. Or, it can refer to a location under the sovereignty of a foreign nation. If, as in *Burnet*, the statute in question was the Internal Revenue Code,[9] and the primary design of the provision was to save Americans from double taxation, then income from a "foreign country" meant income earned in a place under a foreign sovereign (and, thus, under its taxing authority). *Id.* at 7.

2. Divining Congressional intent from patterns of statutory usages can hardly be conclusive in a case construing a *particular* law. Nonetheless, it seems that when Congress meant to strictly define "foreign country" as any locale beyond the sovereignty of the United States, it clearly said so. For example, in the Foreign Sovereign Immunities Act (FSIA), 90 Stat. 2892 (1976) (codified as amended at 28 U.S.C. §§ 1602-11 (1988)), the legislative twin of the FTCA,[10] "foreign state" is every place outside of the "United States," including "all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id.* §§ 1603 (a), (c). *See also* 18 U.S.C. § 1586 (1988) (punishing anyone who transports slaves from any "foreign country *or place* to another") (emphasis added).

Likewise, Congress has occasionally given "foreign country" a permissive meaning as any place under a foreign sovereign. *See, e.g.*, 18 U.S.C. § 1307(c)(2) (operation of State lotteries); and Tariff Act of 1930, 46 Stat. 701, 702 (1930), codified as amended at 19 U.S.C. § 1336(h)(3) (1988) (both statutes provided that "The term 'foreign country' means any empire, country, dominion, colony or

[7] *See, e.g.*, *United States* v. *Spelar*, 338 U.S. 217, 219 (1949) ("We know of no more accurate phrase in common English usage than 'foreign country' . . . ."') (citing *De Lima* v. *Bidwell*, 182 U.S. 1 (1901), which also held "A foreign country was . . . one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States." *Id.* at 180.).

[8] This had been previously suggested by Chief Justice Marshall riding circuit in *The ADVENTURE*, 1 F. Cas. 202, 204-05 (C.C.D. Va. 1812) (No. 93) (Marshall, Circuit Justice), *rev'd on other grounds*, 12 U.S. (8 Cranch) 221 (1814).

[9] The provisions construed in *Burnet* were sections 238 (a) and (e) of the 1921 Revenue Act, 42 Stat. 227, 258-59 (1921).

[10] The FSIA codified restrictive notions of sovereign immunity and granted jurisdiction over foreign states in specified circumstances, including some actions in tort. *See* 28 U.S.C. § 1605(a)(5) (for language that tracks the FTCA).

protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions)").[11]

The availability of alternative statutory formulations for "foreign country," and the fact that Congress has availed itself of the opportunity to more precisely define that phrase, suggest that the only permissible approach to construction is to look to the purpose and intent of the FTCA, in view of other relevant policy goals. By declining this approach, the court of appeals below indulged in an exercise of "mechanical jurisprudence," to use the words of Justice Frankfurter in the only other case this Court has heard concerning the FTCA's "foreign country" exception, *United States* v. *Spelar*, 338 U.S. 217, 223 (1949) (Frankfurter, J., concurring).

B. The FTCA's "Foreign Country" Exception was Intended Primarily to Insulate the United States from Liability Imposed by Foreign Law.

1. As with many such cases, legislative history is of precious little use in determining here whether Congress intended that claims arising from Antarctica be excluded by the FTCA. Despite twenty-eight years of legislative drafting,[12] the "foreign country" exception apparently

[11] *See also, Procter & Gamble Mfg. Co.* v. *United States*, 19 C.C.P.A. 415 (1932), *cert. denied*, 287 U.S. 629 (1932) (whale oil produced on Norwegian ship in Ross Sea (off the Antarctic coast) subject to United States customs duties, under 1930 Tariff Act, because it came from a foreign country; the fact that the vessel was of Norwegian registry was considered dispositive).

[12] The FTCA was the product of dissatisfaction with the old, cumbersome system of considering claims against the government through (continued...)

escaped close scrutiny. Those few occasions where Congress discussed that language were fairly inconclusive, but they do provide some hint, as this Court has already ruled in *Spelar*, about what was generally intended.

First, it was apparently *not* intended that the FTCA exclude outright the claims of foreign nationals. Language considered in 1942 by the House Judiciary Committee would have exempted "any claim arising in a foreign country in behalf of an alien." H.R. Rep. No. 5373, 77th Cong., 2d Sess., at § 303(12) (1942). This version would have "made the waiver of the Government's traditional immunity turn upon the fortuitous circumstance of the injured party's citizenship." *Spelar*, 338 U.S. at 220. The Attorney General objected to that language and the phrase "in behalf of an alien" was dropped. *See Hearings on H.R. 5373 and 6463*, 77th Cong., 2d Sess., at 29, 35, 66 (1942) (hereinafter "*1942 House Hearings*").

Second, it appears that Congress had earlier flirted with the idea of providing a more definite meaning of "foreign country," but ultimately chose not to do so. In 1940, language proposed by a government official to the Senate Judiciary Committee would have made the FTCA "applicable only to damage or injury occurring within the geographical limits of the United States, Alaska, Hawaii, Puerto Rico, or the Canal Zone." *See Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*,

[12](...continued)
a private bill procedure in Congress. *See Spelar*, 338 U.S. at 219-20. Petitioner concedes that without an express waiver of the Government's immunity from suit, an action against the United States is usually impossible. *See United States* v. *Orleans*, 425 U.S. 807, 814 (1976); *Dalehite* v. *United States*, 346 U.S. 15, 30-31 (1953).

76th Cong., 2d Sess. 65 (1940) (proposal by J.J. Keegan, member, U.S. Employees Compensation Comm'n). As has already been noted, *see Beattie* v. *United States*, 756 F.2d 91, 114-15 (D.C. Cir. 1984) (Scalia, J., dissenting), this proposal was never acted upon by the Senate Judiciary Committee. This implies, at least, that Congress was cognizant of alternative formulations but chose to permit FTCA claims arising outside of United States' territory (as long as they were not from a place under a foreign sovereign).

One remaining piece of the legislative history is significant and telling, as this Court realized in *Spelar*. This was the 1942 testimony of Assistant Attorney General Shea, speaking in favor of the draft "foreign country" exception (the one that had dropped the language barring claims of aliens). He said:

> "[c]laims arising in a foreign country have been exempted . . . whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty."

1942 House Hearings, at 35 (testimony of Asst. Att'y Gen. Shea). *See id.* at 66 (comments on bill) ("Claims arising in a foreign country have been exempted from the present bill, whether or not the claimant is an alien, since liability is to be determined by the law of the situs of the wrongful act or omission.").

The fair reading of these passages, as made by this Court in *Spelar*, is that Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." 338 U.S. at 221. Assistant Attorney General Shea's concerns about the "foreign country" exception rested really with the choice of law rule embedded in the FTCA. *See* FTCA, June 25, 1948, ch. 646, § 1346, 62 Stat. 933 (1948) (codified as amended at 28 U.S.C. § 1346(b) (1988)) (the statute imposes liability "in accordance with the law of the place where the act or omission occurred"). In other words, the Court in *Spelar* recognized that a claim under the FTCA could arise outside of the territory of the United States, *provided* that the government's act or omission did not occur in a place where another nation's tort law was in force.

2. It is no surprise, therefore, that the Court in *Spelar* rejected the FTCA claim of an individual who was injured at the U.S. base at Harmon Field, Labrador, an area under a 99-year lease by Great Britain to the United States. *See* 338 U.S. at 217-18.[13] In *Spelar*, the Court followed an earlier decision which held that the United States had only limited control over areas under the lease. *Id.* at 218 (citing *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948) (considering the applicability of the Fair Labor Standards Act to American contractors engaged in construction of a military base at Bermuda, transferred in the same lease)). The Court

[13] The lease was effectuated by an executive agreement. *See* Agreement and Exchange of Letters Respecting Leased Naval and Air Bases, Mar. 27, 1941, U.K.-U.S., art. I, para. 1, 55 Stat. 1560, 1572, 1576, 1590, E.A.S. No. 235 ("The United States shall have all the rights, power and authority within the Leased Areas which are necessary for the establishment, use, operation and defence thereof, or appropriate for their control. . . .").

concluded that applying American tort law in such leaseholds would be an arrogation of authority under the lease agreement. *Id.* at 219. Thus, Newfoundland tort law continued to apply in the area, and the FTCA claim was rejected as "arising from a foreign country" where a foreign tort law was in force.

Many lower courts have faced the question of which locales are "foreign countries" for the purposes of the FTCA. Some have attempted to resolve the dilemma by determining, as in *Spelar*, whether a foreign tort law was in force in the area. *See, e.g.*, *Meredith* v. *United States*, 330 F.2d 9, 10 (9th Cir. 1964), *cert. denied*, 379 U.S. 867 (1964) (U.S. embassy at Bangkok would apply Thai tort law); *Gerritson* v. *Vance*, 488 F. Supp. 267, 268 (D. Mass. 1980) (embassy in Zambia); *Cobb* v. *United States*, 191 F.2d 604, 609-11 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952) (Okinawa, although occupied by the United States after Second World War, remained under Japanese sovereignty with Japanese law still in force); *Burna* v. *United States*, 240 F.2d 720 (4th Cir. 1957) (same). There has been substantial recognition, as a consequence, that Congress was chiefly preoccupied with preventing a foreign law from governing in a FTCA action.

3. Petitioner is mindful of the canon of statutory interpretation that U.S. laws should not be deemed to apply extraterritorially, "'unless a contrary intent appears'." *EEOC* v. *Arabian American Oil Co.*, 111 S.Ct. 1227, 1230 (1991) (quoting *Foley Bros. Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). But this Court went on to say in *Arabian American* that this rule of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* (citing *McCulloch* v. *Sociedad Nacional de Marineros de*

Honduras, 372 U.S. 10, 20-22 (1963)).[14] This merely confirms the proper scope of the inquiry in this case: if Antarctica is "sovereignless," and is without its own civil tort law to apply, then the FTCA's "foreign country" exception was not intended by Congress to bar a claim arising there.

C. Antarctica Belongs to No Sovereign and has no Tort Law of its Own.

1. The proposition that Antarctica is beyond the sovereignty of any nation is undisputed in this case. The court of appeals held below that "Antarctica [is] a sovereignless region without civil tort law." *Smith*, 953 F.2d at 1117; slip op. at 16934; Pet.App. 4. The foreign policy of the United States has been to deny recognition of any State's claim to territorial sovereignty in the Antarctic. *See Law of the Sea Negotiations: Hearings before the Subcomm. on Arms Control, Oceans, International Operations and Environment, of the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 24-25 (1981) (testimony of Ass't Sec. of State James L. Malone). This position is consistent with article IV of the 1959 Antarctic Treaty, which declares that

> "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or

[14] *See also Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 291 (1952) (Reed, J., dissenting) (noting that presumption against a law's extraterritorial effect does not hold where the "statute is applied to acts committed by citizens in areas subject to the laws of no sovereign.") (citing *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941), and *The HAMILTON*, 207 U.S. 398 (1907)).

> create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

Antarctic Treaty, art. IV, para. 2.[15]

The courts of this country are obliged to respect these pronouncements by the executive of what claims to territorial sovereignty are, or are not, to be recognized in Antarctica. *See United States* v. *Pink*, 315 U.S. 203, 229-30 (1942); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 138 (1938) (both concerning status of Soviet Union prior to recognition); *Kennett* v. *Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852) (status of Republic of Texas). Some jurists who have considered the applicability of the FTCA's "foreign country" exception in this context have said that the executive's determination -- that there is no foreign sovereign in Antarctica -- is "binding" on this issue. *See Beattie*, 756 F.2d at 108 (Scalia, J., dissenting). It is beyond peradventure, therefore, that Antarctica is sovereignless.

2. It follows that not only is Antarctica beyond the sovereignty of any nation (a *res nullius* in international law terms),[16] it also cannot have a civil tort law of its own.

[15] The United States currently has no claims staked on the Antarctic continent, although, conceivably, it could be in a position to make some, were the Antarctic Treaty to lapse. *See* Hayton, The "American" Antarctic, 50 *Am. J. Int'l L.* 583 (1956); Lissitzyn, The American Position on Outer Space and Antarctica, 53 *id.* 126, 128 (1959).

[16] *Terra nullius* are those areas, like the high seas and outer space, that "are free for the use . . . of all and [where] persons are not deprived (continued...)

Such a tort law could be imposed by those nations that purport to make a claim of territorial sovereignty to various "sectors" of the Antarctic land mass.[17] But, once again, the United States refuses to recognize such claims of territorial sovereignty, and also such corollary assertions of jurisdiction based on territorial claims.

Under this reading of the FTCA, and in view of the Congressional goal of insulating the United States from liability imposed by another nation's tort law, Antarctica cannot possibly be considered a "foreign country."

[16](...continued)
of the protection of the law merely because of the absence of state sovereignty." Ian Brownlie, *Principles of Public International Law* 177 (4th ed. 1990).

[17] For a review of the territorial claims made by seven States (Argentina, Australia, Chile, France, Great Britain, New Zealand, and Norway), at least up to the time they were "frozen" under the terms of article 4 of the Antarctic Treaty, *see* Hayton, The Antarctic Settlement of 1959, 54 *Am. J. Int'l L.* 349 (1960).

A sector is a pie-shaped wedge of territory, and all sector claims in the Antarctic intersect at the South Pole.

II.
NO POLICY IS SERVED BY BARRING FTCA CLAIMS FROM ANTARCTICA.

A. U.S. Law Does not Treat Citizens in the Antarctic as Being in a Foreign Country.

1. Although the United States rejects the assertion, by any State, of territorial sovereignty in the Antarctic, it does, however, recognize assertions of jurisdiction in Antarctica based on nationality. Obvious examples include the United States' own extension of jurisdiction over crimes committed by Americans in the Antarctic. When Congress extended the special maritime and territorial jurisdiction of the United States to "[a]ny place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States," Act of Oct. 12, 1984, Pub. L. No. 98-473, title II, ch. 12, part H, § 10, 98 Stat. 2164 (codified at 18 U.S.C. § 7(7) (1988)), it clearly had incidents in Antarctica in mind. *See Extraterritorial Criminal Jurisdiction, 1977: Hearing on H.R. 763, 6148 & 7842 Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. of the Judiciary*, 95th Cong., 1st Sess. 31 (1977) (testimony of Robert L. Keuch, Dep. Ass't Att'y General) (legislation is required to cover crimes committed in remote and isolated environments, such as the Antarctic). Obviously, the United States does not recognize other

nations' criminal jurisdiction over Americans in Antarctica.[18]

Quite appropriately, the United States considers income earned by citizens in Antarctica as not being sourced to a foreign country, but, rather, subject to full taxation as if earned in the United States proper. Originally, this result was achieved through a judicial construction of the operative phrase "foreign country" in the relevant provision of the Internal Revenue Code, 26 U.S.C. §§ 911(a)(1), (b)(1)(A) (1988). The Tax Court, in *Martin* v. *C.I.R.*, 50 T.C. 59 (1968), held that Antarctica was not a "foreign country," and the taxpayer was fully assessed on his income earned there. This result was later codified into law. *See* 26 U.S.C. § 863(d)(2)(A) (1988); *see also Hearings on Tax Reform Act of 1986*, S. Rep. No. 313, 99th Cong., 2d Sess. 358 (1986).

2. Petitioner again recognizes that this consistent legislative practice -- of not treating Antarctica as a foreign country -- cannot be dispositive in a case construing the FTCA. Nonetheless, it is highly suggestive that Congress has recognized Antarctica's *terra nullius* character, and has sought to assimilate U.S. activities on the Southern continent to those on the high seas, that other great expanse of area beyond the jurisdiction of any nation. And, as Chief Justice

[18] Some nations purport to extend jurisdiction in the Antarctic based on claims of territorial sovereignty. As noted, *supra*, the United States does not recognize such assertions of jurisdiction. Other nations do exercise, through statutory enactment, sweeping jurisdiction over their own nationals in the Antarctic. This type of jurisdiction -- based on nationality -- the United States does recognize, as it is the same basis of our legislation over activities in Antarctica. *See, e.g.*, New Zealand's Antarctica Act 1960, No. 47, s. 3(1)(b), reprinted in 3 W.M. Bush, *Antarctica and International Law* 81; South African Citizens in Antarctica Act, 1962, No. 55, s. 2, reprinted in *id.* at 202.

Marshall noted in one of the first reported cases construing the meaning of the phrase "foreign country" (as it appeared in the Non-Intercourse Act, 2 Stat. 528 (1809)), "the sea is the common property of all nations. It belongs equally to all. None can appropriate it exclusively to themselves: nor is it 'foreign' to any." *The ADVENTURE*, 1 F. Cas. 202, 204-05 (C.C.D. Va. 1812) (No. 93) (Marshall, Circuit Justice), *rev'd on other grounds*, 12 U.S. (8 Cranch) 221 (1814).

When the FTCA is understood in light of those statutes waiving sovereign immunity for acts or omissions of the government on the high seas, the folly of considering Antarctica a "foreign country" is apparent. The FTCA excludes from its jurisdiction, *see* 28 U.S.C. § 2680(d) (1988), claims for which a remedy is provided by the Suits in Admiralty Act, ch. 95, § 5, 41 Stat. 526 (1920) (codified at 46 U.S.C. § 745 (1988)). The Suits in Admiralty Act would allow a claim against the United States for an action within the purview of a related piece of legislation, the Death on the High Seas Act ("DOHSA"), ch. 111, § 1, 41 Stat. 537 (1920) (codified at 46 U.S.C. § 761 (1988)). In other words, a wrongful death claim against the United States arising just *offshore* the McMurdo Station, on a frozen part of the Southern ocean, would be allowed to proceed. *See, e.g.*, *Roberts* v. *United States*, 498 F.2d 520, 526 (9th Cir. 1974) (representatives of those killed in air crash just a few thousand feet short of runway off Okinawa had claim under DOHSA through Suits in Admiralty Act, but not under FTCA because Okinawa was considered a "foreign country"), *cert. denied*, 419 U.S. 1070 (1979).

It defies reason to read the FTCA to bar a claim from one sovereignless region (the Antarctic land mass), while allowing an action in another region beyond any nation's sovereignty (the high seas), just because one place is land and

the other is water. DOHSA and the FTCA are meant to provide parallel remedies for persons injured by the government. It makes sense to consider Antarctica, the only land area on the globe which is *res nullius*, to be similar in legal character to the high seas and, thus, not a "foreign country."

B. The FTCA's Choice of Law and Venue Provisions are not Upset by Antarctic Claims.

1. As far as Petitioner can ascertain from the decision below, the primary reason that the court of appeals decided that Antarctica was a "foreign country" had nothing to do with the Congressional intent of that language, or the international legal status of Antarctica. Instead, the Ninth Circuit concluded that to allow claims to arise from Antarctica would cause insuperable choice of law difficulties under the FTCA. The court of appeals read the choice of law provision of the FTCA, 28 U.S.C. § 1346(b) (1988) (imposing liability on the government "in accordance with the law of the place where the act or omission occurred"), to indicate that Congress did not wish for the FTCA to apply to the Antarctic, which has no tort law of its own. *Smith*, 953 F.2d at 1119; slip op. at 16938; Pet.App. 8. But, as discussed *supra*, the "foreign country" exception was intended to prevent a suit arising from a place where a foreign tort law was in force. In other words, the situation presented here is "*directly opposite* to the [legislative] fear of becoming entangled in foreign law, which produced the 'foreign country' exception." *Beattie*, 756 F.2d at 105 (original emphasis).

The court of appeals failed to recognize that the FTCA requires that the whole law of the *lex loci delicti* be

applied, both its substantive tort provisions and its choice of law rules. This was the decision in *Richards* v. *United States*, 369 U.S. 1 (1962), which construed section 1346(b) of the FTCA. *Id.* at 13-14. The FTCA requires, therefore, that a court determine whether the choice of law rules embedded in the "law of the place where the act ... occurred" might not require that another jurisdiction's *substantive* law be applied. In conflicts parlance, this is known as renvoi.[19]

Federal courts have grown accustomed to renvoi in their search for the proper substantive tort law to apply in FTCA actions. *See, e.g.*, *Guillory* v. *United States*, 699 F.2d 781, 784-87 (5th Cir. 1983) (applying Louisiana law under choice of law rules of Texas, where negligence occurred); *Loge* v. *United States*, 662 F.2d 1268, 1273 (8th Cir. 1981) (applying Arkansas law under District of Columbia choice of law rules), *cert. denied*, 456 U.S. 944 (1982); *Hensley* v. *United States*, 728 F. Supp. 716, 721 (S.D. Fla. 1989) (applying Florida law under New York's choice of law rules). The vitality of the renvoi rule of *Richards*, necessitated by the very language and structure of the FTCA, is not questioned by Petitioner.

2. This Court might be justified in sharing the Ninth Circuit's concerns *if* a plaintiff were asking for a substantive tort law to be fashioned out of whole cloth for claims arising

[19] American conflicts jurisprudence adopted the French word (meaning "echo") for its rich connotation of a forum state's reference to another state's law, a process which causes the choice of law to "bounce back," like an echo off a wall. *See generally*, Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 3.13 (1992).

exclusively in Antarctica.[20] As Judge Wald noted in *Beattie*, "the question here is not which substantive law will apply but which choice of law rule will apply." 756 F.2d at 139 (Wald, J., concurring). Petitioner submits that where the *lex loci deliciti* is a place not subject to any sovereign (and thus not having any tort law of its own), the law governing the action is that of the victim's domicile. This result is reached by one of two doctrinal paths: the traditional private international law of "personal sovereignty," and the modern, interest balancing approach encapsulated in section 6 of the Conflicts *Restatement*. Both roads, as will be traversed below, lead to the same place for this case. That is Oregon -- the law of the Petitioner's domicile and of the forum.

3. When an individual is injured in a land having no tort law of its own, courts will, instead, apply the law of that person. This "old notion of personal sovereignty," as Justice Holmes called it, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.), is quite old, indeed. It was recognized in English law as early as 1774 in the case of *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 181, 98 Eng. Rep. 1021, 1032 (K.B. 1774) (Mansfield, C.J.), and perhaps nearly a century before. *See Dutton* v. *Howell*, 1 Show. Parl. Cas. 24, 30, 1 Eng. Rep. 17, 21 (H.L. 1693). It was, of course, a convenient doctrine, allowing British subjects to avail themselves of their own courts in actions involving other Englishmen, even though those actions arose in places

[20] This case does not present the irksome problem of multiple claims and allegations of various places where governmental acts or omissions occurred. This was, in a real sense, the trouble with *Beattie*, where the New Zealand claimants alleged both the negligence of U.S. air traffic controllers at McMurdo, as well as a "headquarters claim" (in the District of Columbia) for the Navy's failure to properly train and supervise them. *See* 756 F.2d at 93.

not subject to any law (as long as those actions were not strictly local, such as questions involving title to land). *See, e.g.*, *British South Africa Co.* v. *Companhia de Mocambique*, [1893] App. Cas. 602, 605 (counsel's argument), 618-19 (Herschell, L.C.); *Hart* v. *Gumpach*, 4 L.R.-P.C. 439, 463-66 (1873) (Smith, J.). Over the years, as nations established themselves in every part of the habitable globe, the rationale for "personal sovereignty" lessened, and, today, of course, one would be hard-pressed to find any part of the temperate or tropical earth not having its own tort law. As recently as 1971, however, the House of Lords reaffirmed that if one Englishman wrongfully injures another in a "primitive or unsettled territory" where there is no law of torts, English law could be applied. *See Chaplin* v. *Boys*, [1971] App. Cas. 356, 396, 401 (Pearson, L.J.).

The teaching of these British authorities was recognized in two opinions of this Court, both by Justice Holmes. In *American Banana*, he wrote

> "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."

213 U.S. at 355-56. Two years earlier, in *The HAMILTON*, 207 U.S. 398 (1907), Justice Holmes averred to this point and said "the bare fact of the parties being outside the territory [of the United States] in a place belonging to no other sovereign would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas." *Id.* at 403.

In the case at bar, there is, once again, no question that Antarctica has no sovereign and thus has no substantive tort law. Nor is there any question here that the decedent was a citizen of the United States and a resident of Oregon. Notwithstanding his foray to the Southern continent, he did not lose his status as an Oregon domiciliary; Antarctica having no sovereign, it obviously cannot have a *lex domicilii*. Where, as here, both parties are "citizens of the adjudicating forum," *Beattie*, 756 F.2d at 113 n.7 (Scalia, J., dissenting), the rule of personal sovereignty can be applied. Antarctica may be the last place on earth where this notion, repeatedly recognized in Anglo-American jurisprudence, can continue to have force. But that does not lessen its relevance here.

4. The D.C. Circuit, in *Beattie* (the only court that has grappled with the choice of law implications of an Antarctic claim), discussed the notion of personal sovereignty, 756 F.2d at 105, 141-42 (Wald, J., concurring), but placed somewhat greater emphasis on the balance of interest factors detailed in section six of the *Restatement (Second) of Conflict of Laws* (1971). This provision is intended to guide the choice of law decisions of adjudicating forums, and includes such elements as

> (a) the needs of the interstate and international systems;
> (b) the relevant policies of the forum;
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
> (d) the protection of justified expectations;
> (e) the basic policies underlying the particular field of law;
> (f) certainty, predictability and uniformity of result; and,

(g) ease in the determination and application of the law to be applied.

Id. § 6.

In an FTCA claim arising from Antarctica, and featuring a resident of an American state as plaintiff, what would be weighed in the *Restatement* calculus are the interests of the American state forum against those of a putative Antarctic forum. It is not much of a contest. *See Beattie*, 756 F.2d at 105 ("Antarctica has no 'forum'"), 141 ("Antarctica has no law, consequently there is no conflict of law problem.") (Wald, J., concurring). Antarctica is an unformed entity and has no law, no forum, and no interest in the outcome of a suit against the United States government. The only conceivable interest of the Antarctic forum is the one held collectively by the parties to the Antarctic Treaty: that no exercise of jurisdiction purport to be a claim of territorial sovereignty. An FTCA claim, premised, as it must be, on the nationality of the defendant (the United States), would be completely in keeping with the terms of the Antarctic treaty régime.

On the other side of the ledger, the state of the plaintiff's residence (as well as the forum), has a substantial interest in applying its law to this case. This is the interest protected by the FTCA's choice of law command in section 1346(b). However arrived at, Oregon's substantive tort law would apply in this case.

5. The choice of law direction that Petitioner suggests here would satisfactorily handle any FTCA claim exclusively arising from a sovereignless locale, provided the forum was in the United States. This leads to the other reason voiced by the Ninth Circuit for disallowing FTCA claims from Antarctica. The court of appeals seized on the venue

provision of the FTCA, 28 U.S.C. § 1402(b) (1988) (laying venue in "the judicial district where the plaintiff resides or wherein the act or omission complained of occurred"), and concluded that

> "[w]hile Smith . . . is able to lay venue in her state of residence because it has a district court, venue would not exist if the plaintiff happened to reside outside the United States. If we were to find that Antarctica is not a foreign country, a resident of New Zealand, or of any other country, injured by the acts or omissions of a U.S. employee in Antarctica, would find sovereignty waived but no venue in which to proceed against the United States. It is unlikely that Congress intended to create a tort remedy in cases for which no venue exists."

Smith, 953 F.2d at 1118-19; slip op. at 16937-38; Pet.App. 7-8 (footnotes omitted).

Petitioner maintains that, on this point at least, the Ninth Circuit has seriously erred by fashioning a new, and utterly unsupportable, canon of statutory construction which would presume that where Congress gives a right of action, it also lays a venue. This Court has consistently ruled that there have always existed situations "in which the federal courts have jurisdiction but there is no district in which venue is proper." *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U.S. 706, 710 n.8 (1972). While such gaps should be closed wherever possible, *id.*, that does not mean that a statute should be construed to *deny* jurisdiction for one claimant, just because a differently situated plaintiff might not find a proper venue.

6. Petitioner does note, though, that a consequence of the choice of law rule endorsed above is that a plaintiff who is not a resident of the United States could not bring an FTCA case if her claim arose *exclusively* in Antarctica.[21] In such a case, the hypothetical plaintiff would be asking a U.S. court to apply not the law of the forum, but the law of her foreign domicile. *This* is the result feared by the Ninth Circuit, although other courts have avoided this obvious trap and remained true to the underlying rationale of the FTCA's "foreign country" exception. *See, e.g.*, *Sami* v. *United States*, 617 F.2d 755, 763 (D.C. Cir. 1979) (rejecting possibility that West German law could be applied to a claim brought for false imprisonment); *Leaf* v. *United States*, 588 F.2d 733, 736 n.3 (9th Cir. 1978) (California law applied despite the fact that some claims also arose in Mexico).

But this concern -- that foreign law will enter an FTCA case by way of renvoi -- is not raised in this case. Nor would it be brought about by the result sought here: an American domiciliary will find a forum's law to apply when she lays her venue in her state of residence. A non-resident of the United States will be unable to find a venue if his case arose exclusively in Antarctica. This outcome is perfectly fair in view of the underlying purpose of the FTCA in preventing the application of foreign law.[22]

[21] In *Beattie*, of course, the New Zealand plaintiffs used their "headquarters claim" in the District of Columbia to bootstrap not only the choice of law analysis, but also the laying of a pendent venue for their Antarctic claim. *See* 756 F.2d at 100-06, 117-30 (Scalia, J., dissenting), 130-43 (Wald, J., concurring).

[22] As noted, *supra* at 13, Congress did reject one version of the FTCA that would have *categorically* denied the claims of aliens. The (continued...)

In this fashion, the "foreign country" exception of the FTCA, as well as its choice of law and venue clauses, are reconciled in a simple rule of decision. That holding is also in perfect harmony with the international legal status of Antarctica and the treatment given, by Congress, of the activities of Americans there.

[22](...continued)
result suggested by Petitioner does not seek to resurrect that language. Instead, the reason that a claim of a foreign resident (arising exclusively from Antarctica) would be barred is that the alien must, by necessity, invoke the law of his "personal sovereignty" or domicile, and that law would be foreign. *See Burna* v. *United States*, 240 F.2d 720, 722 (4th Cir. 1957) (recognizing this rationale in denying claim from Okinawa).

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit ought to be REVERSED.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
EMORY UNIVERSITY
SCHOOL OF LAW
Gambrell Hall
Atlanta, Georgia 30322
Telephone (404) 727-6822

DAVID GERNANT
Of Counsel
One Main Place, Suite 1890
P.O. Box 23594
Portland, Oregon 97281

ALLEN T. MURPHY, JR.
Attorney for Petitioner
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97201

July 29, 1992

FILED
SEP 4 1992
OFFICE OF THE CLERK

No. 91-1538

In the Supreme Court of the United States

OCTOBER TERM, 1992

SANDRA JEAN SMITH, PETITIONER

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

ROBERT S. GREENSPAN
MARK B. STERN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the waiver of sovereign immunity contained in the Federal Tort Claims Act extends to acts or omissions occurring in Antarctica.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 953 F.2d 1116. The opinion of the district court (Pet. App. 18-33) is reported at 702 F. Supp. 1480.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1991. A petition for rehearing was denied on December 24, 1991. Pet. App. 3. The petition for a writ of certiorari was filed on March 20, 1992, and was granted on June 15, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE AND TREATY INVOLVED

The relevant provisions of the Federal Tort Claims Act, ch. 753, 60 Stat. 842-847, codified as amended at 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, and of the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71, are set out in the Appendix to this brief.

STATEMENT

1. a. A continent without indigenous human population, Antarctica has been, and continues to be, subject to overlapping and disputed claims of sovereignty. See generally F. Auburn, *Antarctic Law and Politics* 2-3, 6-83 (1982) [hereinafter *Antarctic Law*]; *The Antarctic Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess. 39, 61-62 (1960) (statement of Herman Phleger, representing the Department of State) [hereinafter *Antarctic Treaty Hearings*]. Seven nations—Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom—have made formal claims (several of which overlap) to portions of the continent that total about 85 percent of its expanse. Boczek, *The Soviet Union and the Antarctic Regime*, 78 Am. J. Int'l L. 834, 840 (1984); Hayton, *The Antarctic Settlement of 1959*, 54 Am. J. Int'l L. 349 (1960); Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, 18 San Diego L. Rev. 415, 417-418 (1981); Joyner & Lipperman, *Conflicting Jurisdictions in the Southern Ocean: The Case of an Antarctic Minerals Regime*, 27 Va. J. Int'l L. 1, 8 (1986). The United States does not recognize those claims and does not itself exercise sovereignty over Antarctica, but it maintains a basis for such a

claim. See *Antarctic Treaty Hearings* 3, 39, 58-59; *Antarctic Law* 6; Lissitzyn, *The American Position on Outer Space and Antarctica*, 53 Am. J. Int'l L. 126, 128 (1959) (quoting Loftus E. Becker, Legal Adviser, Department of State).[1]

Despite their disagreements over sovereignty, in 1959 the United States and eleven other nations conducting scientific activities in Antarctica (including the seven nations formally asserting sovereignty over parts of that continent) concluded an international treaty assuring peaceful scientific cooperation in Antarctica. Antarctic Treaty, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The treaty signatories did not renounce any prior claims, or bases on which to make claims, of territorial sovereignty in Antarctica. Instead, the parties agreed as follows:

> No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Id., art. IV, 12 U.S.T. at 796. Thus, the treaty essentially "freezes" sovereign claims as of the date of its execution. See *Antarctic Treaty Hearings* 39, 61-62.

b. Primary responsibility for United States research efforts in Antarctica has been given to the National Science Foundation (NSF), which since

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[1] The Soviet Union had also reserved its right to assert territorial claims to Antarctica; that right was based upon succession from Russia, which may claim to have been the first nation to discover the continent. See Boczek, *supra*, 78 Am J. Int'l L. at 840-841.

1959 has operated the United States Antarctic Program (USAP) (previously known as the United States Antarctic Research Program). See *Antarctic Minerals Policy: Hearing Before the Subcomm. on Transportation, Aviation and Materials and the Subcomm. on Science, Research and Technology of the House Comm. on Science, Space and Technology*, 101st Cong., 2d Sess. 62 (1990) (statement of Dr. Peter Wilkniss, Director, Division of Polar Programs, National Science Foundation). In operating the USAP, NSF receives logistic support from the Department of the Navy. Pet. App. 29, ¶¶ 18, 19.

McMurdo Station on Ross Island, Antarctica, is the primary logistics facility for USAP field science projects and for airborne resupply of inland stations within Antarctica. Pet. App. 29, ¶ 21. Ross Island is located in an area over which New Zealand (as successor to Great Britain) has asserted a claim to sovereignty; New Zealand refers to that area as "the Ross Dependency." See 3 W. Bush, *Antarctica and International Law* 44-47 (1988); Joyner, *supra*, 18 San Diego L. Rev. at 417; F. Auburn, *The Ross Dependency* 5 (1972). Great Britain and Australia (and apparently certain other nations as well) recognize the validity of New Zealand's claim of sovereignty over this area, but the United States does not. See 2 W. Bush, *Antarctica and International Law* 508-509 (1982); *Antarctic Law* 29; P. Quigg, *A Pole Apart: The Emerging Issue of Antarctica* 113 (1983); Bilder, *Control of Criminal Conduct in Antarctica*, 52 Va. L. Rev. 231, 235-236 & n.14 (1966). New Zealand has specifically extended the jurisdiction of its courts and its laws to the territory it claims. See 3 W. Bush, *Antarctica and International Law* 47, 80-83, 86-92; Bilder, *supra*, 52 Va. L. Rev.

at 260-262; see also *Antarctic Treaty Hearings* 61 (statement of Herman Phleger) (stating that Argentina, Chile, and New Zealand purport to have extended their criminal laws into their respective Antarctic sectors, "[s]o that they do have government in those areas. There may be 50 people in the area, but they do have governments.").

2. Petitioner Sandra Jean Smith is a resident of Oregon and the widow of John Emmett Smith. At the time of his death, Mr. Smith worked in Antarctica at McMurdo Station for a construction company under contract to the National Science Foundation. Pet. App. 26-27.[2]

In October 1986, upon arrival at McMurdo Station, Mr. Smith attended an orientation briefing. At that briefing, he was specifically informed, *inter alia*, that Antarctica is a dangerous place and that "foot plan[s]" had to be filed whenever individuals chose to participate in off-base recreational travel. Pet. App. 27-28.[3] On November 23, 1986, Mr. Smith and two companions took a recreational hike to Castle Rock, located several miles outside of McMurdo Station. As required by applicable regulations, Mr. Smith and his companions filed a foot plan before embarking on their hike. In that plan, they neither sought nor obtained permission to deviate from the flagged route to Castle Rock. *Id.* at 30-31.

Mr. Smith and his companions followed the flagged route on their way to Castle Rock and for part of

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[2] The stipulated facts are reprinted as an attachment to the district court's opinion. Pet. App. 26-33.

[3] The requirement that foot plans be filed for off-base recreational travel was set forth in COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2, which establishes off-base travel procedures for Antarctica. Pet. App. 30-31.

their return hike. They then departed from the flagged route to hike across a snow field in the direction of Scott Base, a New Zealand base located near McMurdo Station. Although Mr. Smith and one of his companions sank in the snow to above their knees, they continued onward. Pet. App. 31-32.

After the three men stopped for a snack, one of them took a step and suddenly dropped from sight. Mr. Smith then took a step and he, too, disappeared. Both men had fallen into a crevasse. Despite efforts of American and New Zealand search and rescue personnel, Mr. Smith died from a combination of exposure and internal injuries suffered as a result of the fall. Pet. App. 33.

3. Petitioner filed this wrongful death action against the United States in federal district court in Oregon. The complaint asserted that jurisdiction was proper under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, because the United States had allegedly been negligent in failing to provide adequate warning of dangers posed by crevasses in areas beyond the flagged paths in Antarctica. Petitioner based her claim exclusively on acts or omissions occurring in Antarctica; she did not rely upon any conduct in the United States. See Pet. App. 5 n.3.

The district court dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 18-33. The court held that petitioner's claims were barred because the FTCA includes a specific exception precluding assertion of jurisdiction over "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k); Pet. App. 20-26.

4. The court of appeals affirmed. Pet. App. 1-17. The court noted that the term "foreign country" is

susceptible of different interpretations, and looked to the language and structure of the FTCA as a whole in determining whether Antarctica should be treated as a foreign country under that statute. *Id.* at 5-6. The court first observed that the FTCA's venue provision permits tort suits to be prosecuted against the United States "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," 28 U.S.C. 1402(b), and concluded that permitting FTCA suits for claims arising in Antarctica would lead to the anomalous result that non-residents of the United States would have a cause of action for Antarctic injuries but no venue in which to bring it. Pet. App. 7-8. The court found it "unlikely that Congress intended to create a tort remedy in cases for which no venue exists." *Id.* at 8.

The court also relied on the FTCA's choice-of-law provision, which makes the United States liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Noting that Antarctica has no tort law at all, the court concluded " 'that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties.' " Pet. App. 8.

The court held in the alternative that, even if Antarctica were not properly characterized as a "foreign country" for purposes of the FTCA, petitioner's suit would nonetheless be barred. The court reasoned that the FTCA was "a limited relinquishment by Congress of the common law immunity the United States enjoyed from tort claims," and held that the absence of any evidence of congressional intent to subject the United States to liability for claims arising in Antarctica precluded petitioner's suit. Pet. App. 9.

The court recognized that in *Beattie* v. *United States*, 756 F.2d 91 (D.C. Cir. 1984), a divided panel of the District of Columbia Circuit had reached a contrary conclusion. However, the court noted its agreement "with the approach and conclusions of then Judge Scalia," who dissented in *Beattie*. Pet. App. 6.

Judge Fletcher dissented. Judge Fletcher reasoned that the purpose of the foreign-country exception was to ensure that the United States would not "find itself subject to liability under the laws of a foreign sovereign." Pet. App. 12. In her view, that underlying purpose would not be frustrated by permitting suits for injuries occurring in Antarctica, because Antarctica has no law to apply. *Ibid.* Instead, Judge Fletcher concluded that the court could properly apply the law of Oregon (the forum State and the State of petitioner's residence). *Id.* at 15.

SUMMARY OF ARGUMENT

I. The United States has personnel stationed throughout the world performing a broad range of activities. Congress has nevertheless provided that the United States cannot be sued under the FTCA for acts of negligence that occur in a "foreign country." Petitioner contends that the scope of this exception turns on whether the United States has recognized the legitimacy of another government's claim of sovereignty over the foreign land where the injury occurs. Otherwise, she contends, the foreign land is not a "country" for purposes of the FTCA. But the FTCA cannot fairly be read to turn on such sensitive issues of foreign relations. Reading the Act as a whole, and against the backdrop of established canons of interpretation, it is readily apparent that the

United States is immune from suit for acts of alleged negligence in any foreign land—from Antarctica to Zambia—regardless of whether the United States has recognized the validity of any one nation's claim of sovereignty over that region.

A. The common-sense reading of the statutory phrase "foreign country" encompasses all regions situated outside the territorial boundaries of the United States, and is not limited to regions that have a recognized government. Indeed, the first dictionary definition of "country" is simply "an expanse of land of undefined but usu[ally] considerable extent," and the first definition of "foreign" is "situated outside a place or country." *Webster's Third New International Dictionary* 521, 889 (1986).

B. The language and structure of the Act as a whole confirm this interpretation of the foreign-country exception. First, the FTCA imposes liability on the United States only "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. 1346(b), and thus clearly precludes claims arising in Antarctica, a place without indigenous law. Petitioner urges the Court to ignore the plain language of this choice-of-law provision and apply instead what she characterizes as international conflict-of-laws rules, but those rules are simply inapplicable in FTCA cases. Section 1346(b) clearly requires application of the law "of" the place where the allegedly tortious conduct occurred, and international conflict-of-laws rules cannot be deemed the law "of" Antarctica for purposes of the FTCA.

Second, petitioner's construction also leads to the anomalous result that the FTCA creates a cause of action for all Antarctic tort claims against the United

States, but provides no venue for those claims unless they happen to have been brought by residents of the United States. See 28 U.S.C. 1402(b) (establishing venue "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."). Congress expressly declined to enact a version of the FTCA that would have differentiated between foreign and domestic claimants, but petitioner's reading of the Act would effectively nullify that congressional decision with respect to claims arising in Antarctica. Moreover, petitioner's construction conflicts with the principle that "Congress does not in general intend to create venue gaps," and that "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Brunette Machine Works, Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972).

Third, these provisions of the FTCA comprise a limited waiver of sovereign immunity, and as such they must be strictly construed. *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). The rule of strict construction should be applied to foreclose petitioner's claim.

C. The presumption against extraterritoriality likewise supports rejection of petitioner's arguments. This Court has repeatedly reaffirmed the proposition that Congress is presumed to legislate only domestically and that congressional enactments will therefore not be given extraterritorial effect "unless there is 'the affirmative intention of the Congress clearly expressed' " to achieve that effect. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991). The Court recognized in *United States* v. *Spelar*, 338 U.S. 217, 222 (1949), that Congress's inclusion of the

foreign-country exception in the FTCA confirms that the presumption against extraterritorial application should apply to issues arising under the FTCA. Contrary to petitioner's assertions, the presumption is not limited to cases in which the potential for international tension can be demonstrated, but instead serves to implement the notion that "Congress is primarily concerned with domestic conditions." *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949).

D. Petitioner seeks refuge in the legislative history of the FTCA, but the clarity of the Act's language and structure, construed as a whole, makes reliance on such materials inappropriate. In any event, the Court has already construed the FTCA's enactment history and concluded that "the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States," *United States* v. *Spelar*, 338 U.S. at 219, providing direct support for the court of appeals' interpretation of the Act.

II. Finally, even if petitioner were correct in asserting that Antarctica is not a "foreign country" for purposes of the FTCA, her claim would still fail. The choice-of-law and venue provisions make clear, and the presumption against extraterritoriality reconfirms, that the FTCA was not intended to apply to claims arising outside the territory of the United States, and thus the judgment below should be affirmed.

ARGUMENT

I. ANTARCTICA IS A "FOREIGN COUNTRY" WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT

A. The Common-Sense Reading of the Term "Foreign Country" Encompasses Antarctica

As the courts of appeals have recognized, "[t]he words 'foreign country' are not words of art" and are used in Section 2680(k) "with the meaning dictated by 'common sense' and 'common speech.'" *Meredith* v. *United States*, 330 F.2d 9, 10-11 (9th Cir.), cert. denied, 379 U.S. 867 (1964). Common sense and common usage defeat petitioner's effort to distinguish foreign continents over which sovereignty is in dispute from other foreign lands for purposes of the "foreign country" exception of the FTCA. The first dictionary definition of "country" is simply "an expanse of land of undefined but usu[ally] considerable extent," and the first definition of "foreign" is "situated outside a place or country." *Webster's Third New International Dictionary* 521, 889 (1986); see also *Beattie* v. *United States*, 756 F.2d 91, 109 (D.C. Cir. 1984) (Scalia, J., dissenting). Moreover, this common-sense meaning of "foreign country" is preferred not merely by lexicographers; it was invoked during congressional consideration of the Antarctic Treaty. See *Antarctic Treaty Hearings* 61 (statement of Sen. Aiken) ("If this agreement is approved, Antarctica becomes a country without a government.").

To be sure, this interpretation of "foreign country" is not, in the abstract, the only possible reading of the term. Seizing upon that fact, petitioner urges the Court to turn immediately to the statute's legislative history in an attempt to justify her narrow reading of the key statutory phrase. Pet. Br. 12-16. Although the legislative history in fact supports the court of appeals' reading, see pp. 29-32, *infra*, "[i]nterpretation of a statute must begin with the statute's language," *Mallard* v. *United States Dist. Court*, 490 U.S. 296, 300 (1989), and "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991); see also *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Richards* v. *United States*, 369 U.S. 1, 11 (1962). Whatever doubt may remain when the phrase "foreign country" is considered in isolation, the structure and language of the FTCA as a whole confirm that a "foreign country" includes a foreign land with no recognized government.

B. The Choice-of-Law and Venue Provisions of the Federal Tort Claims Act Make Clear That the Act Does Not Extend to Antarctica

1. The FTCA waives the immunity of the United States "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). As this Court observed in *Richards* v. *United States*, 369 U.S. 1, 6 (1962), Section 1346(b) is "[t]he principal provision of the Federal Tort Claims Act." It is not merely a choice-of-law provision; it measures the scope of the government's waiver of immunity. As such, "it was designed to build upon the legal relationships formulated and characterized by the States, and, to that extent, the statutory scheme is exemplary of the generally interstitial character of federal law." 369 U.S. at 7. Accordingly, this Section

"requires application of the whole law of the State where the act or omission occurred," *id.* at 11, including the State's conflict-of-laws rules.

Because Antarctica concededly has no indigenous law, it is evident that the "principal provision" of the FTCA provides no basis for suit on claims arising in Antarctica. Petitioner urges, however, that the Court ignore the controlling language of the statute and look instead to the conflict-of-laws principles that would allegedly obtain in a suit between private parties. Pet. Br. 23-28. According to petitioner, those principles require that "[w]hen an individual is injured in a land having no tort law of its own, courts will, instead, apply the law of that person." Pet. Br. 25.[4]

But whatever the principles applicable in a case between private parties may be, those principles are irrelevant here, as the FTCA quite clearly provides its own exclusive answer to the choice-of-law question posed by petitioner. Section 1346(b) requires application of both the substantive law and the conflict-of-laws rules "of the place where the act or omission occurred." International conflict-of-laws principles cannot, by sleight-of-hand, be transformed into the law "of" Antarctica within the meaning of Section 1346(b). To the contrary, it is readily apparent that the conflict-of-laws rules petitioner asks this Court to apply are not the law "of" Antarctica at all, but rather the law of the United States, which is decidedly *not* "the place where the act or omission occurred." 28 U.S.C. 1346(b).[5] Petitioner's attempt to

[4] In asserting that the law of the plaintiff's domicile should govern Antarctic FTCA claims, petitioner relies in part on a balancing of the factors set forth in Section 6 of the Restatement (Second) of Conflict of Laws (1971). Pet. Br. 27. Petitioner's balancing does not take into account all of the factors listed, however. She entirely ignores the interests of the United States, one of the factors specifically noted by the Restatement. See Restatement (Second) of Conflict of Laws § 6 (1971). Thus, petitioner does not address the interest of the United States in avoiding exposure to "novel and unprecedented liabilities," *Beattie* v. *United States*, 756 F.2d at 113 (Scalia, J., dissenting), without the express consent of Congress. She also ignores the potential for international embarrassment that could result from a judicial decree that Antarctica is not a "foreign country" from the standpoint of the United States.

[5] Petitioner relies on both the "old notion of personal sovereignty" requiring application of the law of the injured person's domicile, Pet. Br. 25-27 (quoting *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909)), and the Restatement (Second) of Conflict of Laws. Pet. Br. 27-28. The Restatement, of course, purports to reflect only the laws of *this* Nation, and indeed is explicitly based primarily on cases involving interstate, rather than international, conflicts. Restatement (Second) of Conflict of Laws § 10, comment a (1971). Likewise, while petitioner asserts that the rule of "personal sovereignty" has been approved by the courts of the United States and Great Britain, that hardly serves to transform that rule into the law "of" Antarctica as well. To the contrary, this Court has expressly declined previous invitations to apply its own choice-of-law rules in the FTCA context, see *Richards* v. *United States*, 369 U.S. at 13-14, and petitioner provides no justification for departing from that approach in this case.

Petitioner quite rightly does not attempt to assert that Antarctica possesses its own indigenous conflict-of-laws rules. Any such claim would be fatally undermined by the very source of conflict-of-laws principles on which petitioner relies. The Restatement is quite explicit in defining conflict of laws as "that part of the law *of each state* which determines what effect is given to the fact that the case may have a significant relationship to more than one state." Restatement (Second) of Conflict of Laws § 2 (1971) (emphasis added). Since it is

stretch the FTCA to permit claims arising in Antarctica is inconsistent with the plain language of Section 1346(b), because "Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred." *Richards*, 369 U.S. at 9.

2. Section 1346(b) is not, however, the only provision of the FTCA that contradicts petitioner's interpretation of the foreign-country exception. The FTCA's exclusive domestic focus is also made clear by the Act's venue provision, which provides that FTCA claims may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. 1402(b).[6] As a result of that provision, petitioner's interpretation of the statute would lead to an anomalous result that Congress could not have intended: the FTCA would establish jurisdiction for all tort claims against the United States arising in Antarctica, but no venue would exist for those claims unless the claimant happened to reside in the United States.

The remedy created by the FTCA, however, is not limited by its terms to United States residents. Further, the enactment history of the FTCA supports the conclusion that foreign residents may impose liability

clear that Antarctica is not a "state" within the meaning of the Restatement, see *id.* § 3, any attempt to attribute to Antarctica itself some form of conflict-of-laws rules would run afoul of the Restatement. Thus, Antarctica lacks both substantive tort law and conflict-of-laws rules, and there is accordingly no law "of" Antarctica for a court to apply in an FTCA case arising on that continent.

[6] Needless to say, no "judicial district" encompasses any part of Antarctica. See 28 U.S.C. 81-131.

on the United States in circumstances where residents of this Nation would be permitted to do so. As petitioner concedes (Pet. Br. 13), earlier versions of the FTCA that were considered at length by Congress would have barred claims "arising in a foreign country *in behalf of an alien*." See *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 3 (1940) [hereinafter *1940 Senate Hearings*] (quoting S. 2690, 76th Cong., 3d Sess. § 303(12)) (emphasis added); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 3 (1940) [hereinafter *1940 House Hearings*] (quoting H.R. 7236, 76th Cong., 3d Sess. § 303(12)) (emphasis added). At the suggestion of the Attorney General, the last five words of the proposed bills were excised. See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 1, 4, 6-7 (1942) [hereinafter *1942 House Hearings*]. Thus, as the Court observed in *United States* v. *Spelar*, 338 U.S. 217, 220-221 (1949), "[t]he superseded draft had made the waiver of the Government's traditional immunity turn upon the fortuitous circumstance of the injured party's citizenship. The amended version identified the coverage of the Act with the scope of United States sovereignty." With respect to Antarctica, petitioner's interpretation of the Act would effectively enact the scheme rejected by Congress, because it would deny relief to foreign residents in circumstances where United States residents could recover.[7]

[7] Petitioner nonetheless asserts that she "does not seek to resurrect" the rejected statutory provision that would have

Nevertheless, petitioner attempts to characterize her reading of the FTCA as consistent with the likely intent of Congress, noting that it leads to the happy conclusion that the category of Antarctic FTCA claims most likely to be governed by foreign law—claims on behalf of foreign residents—will never be prosecuted, because no venue exists for such claims. Pet. Br. 30.[8] Brushing aside the Ninth Circuit's cogent reasoning below that "[i]t is unlikely that Congress intended to create a tort remedy in cases for which no venue exists" (Pet. App. 7-8), petitioner points to this Court's observation in *Brunette Machine Works, Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972), that "[t]here have been, and perhaps there still are, occasional gaps in the venue

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barred foreign claims on behalf of aliens. Pet. Br. 31 n.22. But that is precisely what *would* result if petitioner's version of the FTCA were to be accepted: Antarctic FTCA claims on behalf of foreign residents would in effect be barred, while Antarctic FTCA claims on behalf of United States residents would be permitted to proceed. Petitioner's protestation that she "does not seek" that result is commendable, but it cannot hide the fact that her interpretation of the FTCA leads directly and inevitably to the outcome that Congress rejected.

[8] Petitioner's suggestion that her reading of the statute would foreclose all Antarctic FTCA claims arising under foreign law is, however, incorrect. A foreign citizen and resident who was injured as a result of the conduct of United States employees in Antarctica could, under petitioner's reading of the statute, bring suit under the FTCA if that individual became a United States resident after the occurrence of the tort. Under those circumstances, the international choice-of-law rules that petitioner asks this Court to apply in lieu of the law "of" Antarctica would likely require application of *foreign* tort law, and the logic of petitioner's position would permit that suit to proceed.

laws, *i.e.*, cases in which the federal courts have jurisdiction but there is no district in which venue is proper." Pet. Br. 29. According to petitioner, *Brunette Machine Works* demonstrates that the Ninth Circuit "seriously erred" in discrediting her interpretation of the FTCA merely because that interpretation would lead to the conclusion that Congress created jurisdiction over claims for which it provided no venue. *Ibid.*

What petitioner's criticism of the decision below ignores, however, is the remainder of the very footnote she quotes from *Brunette Machine Works*. After describing Congress's decision to remedy a particular venue gap in the past, the Court concluded: "The development supports the view that Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, *in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.*" 406 U.S. at 710 n.8 (emphasis added). Petitioner's reading of the FTCA is inconsistent with the preference expressed in *Brunette Machine Works*. That preference for the avoidance of venue gaps points instead to an interpretation of the FTCA that would limit the scope of the Act to claims arising within the sovereign territory of the United States, precisely the result suggested by the common-sense reading of the foreign-country exception and adopted by the lower courts in this case.

3. The FTCA's venue and choice-of-law provisions clarify that the FTCA was not intended to apply to claims arising in foreign lands, thus resolving any ambiguity in Congress's use of the term "foreign country." This interpretation derives additional sup-

port from the canons of construction invoked by this Court in construing the scope of waivers of sovereign immunity under the FTCA and other statutes.

The FTCA "is a limited waiver of sovereign immunity," *United States* v. *Orleans*, 425 U.S. 807, 813 (1976), and as such is properly subject to the traditional rule that "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed," *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990) (internal quotation marks omitted), and that "[w]aivers of immunity must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires," *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992) (internal quotation marks and citations omitted).

This Court has "on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent," as in certain cases arising under the FTCA. *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992). But even when interpreting the exceptions to the FTCA's waiver of immunity, the Court has cautioned that those exceptions should not be given an unduly narrow reading: "Since the United States can be sued only to the extent it has waived its immunity, due regard must be given to the exceptions * * * to such waiver." *United States* v. *Orleans*, 425 U.S. at 814. Moreover, neither the FTCA's venue provision nor its choice-of-law rule may properly be characterized as an exception to the FTCA's waiver of sovereign immunity; rather, those provisions set forth the terms and conditions of the United States' limited consent to be sued, and as such are subject to the traditional rule that waivers of sovereign immunity must be strictly construed. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

Other decisions of this Court make plain that the language of the FTCA ought not be stretched so as to expand the liability of the United States in the manner envisioned by petitioner. As the Court has explained, the FTCA "waives the immunity of the United States," and "we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Accordingly, the Court has "interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions." *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953).

Petitioner's interpretation of the conflict-of-laws and venue provisions cannot survive application of this traditional canon of construction. Only by limiting the scope of the FTCA to claims arising within the sovereignty of the United States can full effect be given to both the common-sense meaning of the various provisions of the Act and the rule that waivers of sovereign immunity are narrowly construed. Petitioner's attempt to broaden the Act's scope at any cost should therefore be rejected.

C. The Presumption Against Extraterritoriality Requires that Any Doubt Concerning the Scope of the Federal Tort Claims Act Be Resolved Against Its Application To Torts Occurring in Antarctica

Even if the FTCA, considered as a whole, did not explicitly exclude from its jurisdiction all claims arising outside the territory of the United States, this Court's decisions would preclude petitioner's at-

tempted extraterritorial application of the Act. It is well settled that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Accord *United States* v. *Spelar*, 338 U.S. 217, 222 (1949). As the Court explained in *Arabian American Oil Co.*, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." 111 S. Ct. at 1230. Thus, that presumption controls "unless there is 'the *affirmative intention* of the Congress *clearly expressed*' " to extend the reach of the statute beyond the Nation's borders. *Ibid.* (emphasis added).

1. Petitioner does not, and could not, assert that the FTCA clearly and affirmatively waives immunity for claims arising in foreign regions without recognized governments. To the contrary, she concedes (Pet. Br. 10) that the term "foreign country" is "capable of two meanings." Accordingly, the presumption against extraterritoriality requires that the FTCA not be judicially extended to torts occurring outside the territory of the United States in a distant continent subject to conflicting claims of sovereignty.

The fact that the FTCA specifically addresses the issue of extraterritorial application in Section 2680(k) does not undermine the applicability of the presumption against extraterritoriality in this context. To the contrary, as the Court stated in *United States* v. *Spelar*, that presumption, "far from being overcome here, is doubly fortified by the language of this statute and the legislative purpose underlying it." 338 U.S. at 222 (holding that tort claims arising

at United States Air Force Base in Newfoundland fell within the scope of Section 2680(k)).

2. Petitioner instead contends that the presumption against extraterritoriality is applicable only where it furthers the purpose of avoiding "unintended clashes between our laws and those of other nations which could result in international discord." Pet. Br. 16 (quoting *Arabian American Oil Co.*, 111 S. Ct. at 1230). In petitioner's view, apparently, that purpose is not implicated in the context of Antarctica, and thus there is no justification for applying the presumption. Pet. Br. 17.

a. Petitioner errs in assuming away the potential for international discord in Antarctica. The mere fact that Antarctica has no sovereign hardly supports the conclusion that there is no danger of international disagreement. To the contrary, Antarctica is subject to the conflicting sovereign claims of several nations,[9] and the Antarctic Treaty does not purport to resolve those conflicts.[10] Indeed, New Zealand has, in its view, explicitly extended its laws to the whole of the

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[9] Those conflicting claims gave rise to potentially serious international incidents prior to conclusion of the Antarctic Treaty, and there is no guarantee that such incidents could not recur. See, *e.g.*, Bilder, *supra*, 52 Va. L. Rev. at 235 n.13 (referring to naval encounters between British and Argentine warships over Antarctic sovereignty disputes and "diplomatic exchanges illustrating this continuing controversy"); see also Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, 18 San Diego L. Rev. 415, 418 (1981); Hayton, *The "American" Antarctic*, 50 Am. J. Int'l L. 583, 590-593 (1956).

[10] See, *e.g.*, *Antarctic Treaty Hearings* 62 (statement of Herman Phleger) (recognizing continued potential for inter-

area it calls the "Ross Dependency," and might be quite surprised to learn that extension of United States law to that same area creates no potential for conflict or discord under any circumstances.[11] Application of Oregon's tort law in the particular circumstances of this case would be unlikely to create any sort of international incident, but there is no guarantee that future Antarctic FTCA claims would be equally trouble-free from the standpoint of international relations.[12] It is difficult to dismiss, for example, the potential for discord that would be created by a statutory scheme under which numerous foreign domiciliaries injured in Antarctica as a result of the negligence of United States personnel would be denied the right to recover under the FTCA, while at the same time the United States domiciliaries injured in that same incident would be entitled to enjoy the fulsome and well publicized benefits of this Nation's tort system.

b. Moreover, petitioner errs in implicitly assuming that the applicability of the presumption against extraterritoriality is to be determined on a case-by-case basis by looking to whether the reasons for application of the presumption are implicated in each particular instance. The purpose of the presumption would be vitiated if its application were subject to the type of *ad hoc* judicial balancing urged by petitioner; as with all canons of statutory construction, the usefulness of the presumption against extraterritoriality lies precisely in its general applicability, which is based on the understanding that Congress legislates against the backdrop of the presumption and will make its preferences known when it wishes to achieve a different result. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. at 1230; see also *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888, 898 (1991). As the Court observed in *Arabian American Oil Co.*, Congress is aware "of the need to make a clear statement that a statute applied overseas," and "has expressly legislated the extraterritorial application of a statute" where it wishes

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national controversy and conflicting laws in Antarctica under Antarctic Treaty).

[11] As petitioner correctly notes (Pet. Br. 17-18), the United States has declined to recognize the territorial claims of any nations in Antarctica (including those of New Zealand), and that determination by the executive branch is binding on the courts. See, *e.g.*, *Beattie* v. *United States*, 756 F.2d at 108 (Scalia, J., dissenting) (citing *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942)). But the relevant question is whether the potential for international discord exists in Antarctica, not whether the United States recognizes the validity of the various national claims that might produce such discord. The United States' refusal to recognize New Zealand's claim to a portion of Antarctica, for example, is scarcely a factor calculated to reduce the potential for international discord in that region.

[12] New Zealand is not the only nation that claims sovereignty over areas in which the United States conducts significant Antarctic operations. In addition to McMurdo Station, the United States operates two other year-round stations in Antarctica: Palmer and Amundsen-Scott. Palmer Station is located on the Antarctic Peninsula, which is subject to the overlapping claims of Great Britain, Chile, and Argentina; Amundsen-Scott is located at the geographic South Pole, and thus is arguably within *all* of the pie-shaped sectors claimed by the various nations asserting sovereignty in Antarctica (with the possible exception of Norway, which has rejected the "sector" theory). The potential for international discord in these areas of overlapping sovereign claims cannot be denied.

to overcome the presumption. 111 S. Ct. at 1235 (citing statutes). Accord *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."). Here, petitioner seeks to apply the FTCA to a claim arising outside the territory of the United States, and thus the presumption against extraterritoriality is squarely implicated.

c. In addition, petitioner is simply incorrect in assuming that the presumption against extraterritoriality has no purpose or justification other than the need to minimize the risk of international discord resulting from the clash of conflicting laws. To the contrary, the presumption derives from a variety of considerations, including most saliently the commonsense notion that Congress generally legislates with domestic concerns in mind, and ought not be deemed to have enacted laws applicable outside this Nation unless the decision to achieve that result is clearly expressed. See *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949) (presumption against extraterritoriality "is based on the assumption that Congress is primarily concerned with domestic conditions"). Thus, for example, this Court has applied the presumption in concluding that the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.* (which petitioner describes as the "legislative twin of the FTCA" (Pet. Br. 11)) does not extend to the high seas. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. at 440-441.[13]

[13] Petitioner relies on Justice Reed's *dictum* in his dissenting opinion in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 291 (1952) (Reed, J., joined by Douglas, J., dissenting), for the proposition that "a statement of specific contrary intent will not be deemed so necessary * * * where a statute is applied to acts committed by citizens in areas subject to the laws of no sovereign." The two cases cited in support of that proposition, however, *Skiriotes* v. *Florida*, 313 U.S. 69 (1941), and *The HAMILTON*, 207 U.S. 398 (1907), are inapposite; both cases involved the constitutionality of *state* laws, and stand merely for the proposition that Congress and the States may legislate with respect to the conduct of their citizens on the high seas and abroad. *Skiriotes* v. *Florida*, 313 U.S. at 73-79; *The HAMILTON*, 207 U.S. at 403-405. In any event, an offhand remark in a dissenting opinion cannot serve to undermine this Court's statements in *Foley* and *Amerada Hess* making clear that the presumption against extraterritoriality serves purposes other than the avoidance of international discord and applies with full force in sovereignless areas such as the high seas.

Accordingly, petitioner's attempt to render inapplicable the presumption against extraterritoriality must fail. Because there is no clear expression of congressional intent to apply the FTCA outside the territory of the United States, and because the foreign-country exception serves merely to reinforce the conclusion that Congress legislated only with respect to domestic concerns, see *United States* v. *Spelar*, 338 U.S. at 222, the FTCA should not be construed to extend to claims arising in Antarctica.[14]

[14] Petitioner asserts that her reading of the statute is bolstered by Congress's decision to treat Antarctica in the same manner it treats the high seas for purposes of taxation and criminal law. Pet. Br. 20-23 (citing 26 U.S.C. 863(d)(2)(A) and 18 U.S.C. 7(7)). If anything, however, the statutes relied on by petitioner support the opposite reading of the FTCA, because they demonstrate that Congress knows how to extend United States law to foreign regions and the high seas when it chooses to do so. Indeed, petitioner's repeated attempts to equate Antarctica with the high seas serve merely

D. The Legislative History of the Foreign-Country Exception Does Not Cast Doubt on the Conclusion That the Exception Encompasses All Claims Arising Outside the Sovereign Jurisdiction of the United States

Petitioner seeks to avoid the obvious implications of the language and structure of the FTCA by relying on the legislative history of the Act's foreign-country exception. According to petitioner, that legislative history reveals, and this Court's analysis of that history in *United States* v. *Spelar* confirms, that the sole purpose of the foreign-country exception was to insulate the United States from liability under the laws of a foreign nation. As a result, petitioner contends, FTCA claims arising outside the United States *should* be permitted so long as the law of another nation would not govern those claims. Pet. Br. 12-15.[15] Petitioner's reliance on legislative history does not provide support for her interpretation, however.

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to demonstrate the weakness of her position, because it is settled law that the presumption against extraterritoriality applies to the high seas. See *Amerada Hess*, 488 U.S. at 440-441.

[15] Of course, petitioner's argument based on the underlying "purpose" of the foreign-country exception proves far too much. If, as petitioner asserts, the foreign-country exception may be read no more broadly than is absolutely necessary to preclude the prosecution of FTCA claims under foreign law, there is no justification for applying the foreign-country exception as an absolute bar even to tort claims arising in foreign nations. Modern international choice-of-law principles would likely result in application of United States law to claims brought, for example, by a United States citizen injured by United States government employees while visiting a United States military base in Europe; accordingly, under

1. In the first place, the language of the FTCA construed as a whole leaves no room for the interpretation urged by petitioner. There is accordingly no basis for looking to the legislative history of the statute. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). Even if petitioner were correct in asserting (Pet. Br. 14) that "Congress was cognizant of alternative formulations but chose to permit FTCA claims arising outside of [the] United States' territory," the absence of any support for that position in the language and structure of the statute would be fatal to petitioner's claim: "The question * * * is not what Congress 'would have wanted' but what Congress enacted in the [statute]." *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2168 (1992).

2. In any event, petitioner's reading of the FTCA draws no support from the legislative history of the foreign-country exception. Petitioner points to a revised bill offered by one J. J. Keegan of the United States Employees' Compensation Commission that would have, *inter alia*, expressly limited the scope of the FTCA to injuries "occurring within the geo-

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petitioner's narrow view of the foreign-country exception, the citizen's FTCA claim should be permitted to proceed, because it would not frustrate the purpose of the exception. In essence, the logic of petitioner's position would convert the foreign-country exception from a bright-line rule precluding all claims arising outside the territory of the United States into an *ad hoc*, case-by-case balancing test requiring complex and costly litigation over choice-of-law issues every time an employee of the United States is alleged to have committed a tort overseas.

graphical limits of the United States, Alaska, Hawaii, Puerto Rico, or the Canal Zone." *1940 Senate Hearings* 65. Mr. Keegan's bill was never formally introduced by any member of Congress or considered by the subcommittee before which Mr. Keegan testified, however, and thus there is no basis whatsoever for asserting that the bill sheds any light on the actual intentions of the Congress that enacted the FTCA in 1946. See *Beattie* v. *United States*, 756 F.2d at 114-115 (Scalia, J., dissenting).[16]

Of considerably more significance as evidence of legislative intent is the testimony of Assistant Attorney General Francis M. Shea, who gave the following explanation of the foreign-country exception as proposed by the Department of Justice (and later enacted into law as Section 2680(k)):

> "Claims arising in a foreign country have been exempted . . . whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise *to restrict the bill to claims arising in this country.* This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty."

[16] The principal innovation of Mr. Keegan's suggested bill was its proposal that the power to decide tort claims against the United States be vested in the United States Employees' Compensation Commission. See *1940 Senate Hearings* 57-58, 62-64. That notion was roundly criticized by a representative of the American Bar Association in testimony before a subcommittee of the House Judiciary Committee, on the ground that "permitting a bureau to generally handle remedies for private wrongs would be an unwarranted usurpation of judicial functions." *1940 House Hearings* 6 (statement of Mr. Charles Ruzicka). If any members of Congress gave any consideration at all to Mr. Keegan's suggested bill, it seems likely that their reasons for rejecting it had to do with this aspect of the bill, and not with its revision of the language of the foreign-country exception, which was, after all, merely one of the many minor technical suggestions accompanying Mr. Keegan's proposal.

1942 House Hearings 35 (emphasis added).[17] Petitioner reads this passage to support her conclusion that the FTCA does not bar foreign claims as long as United States tort law is to be applied (Pet. Br. 15), but the italicized language clearly suggests instead that the foreign-country exception was understood to limit the FTCA to claims arising within the sovereignty of the United States. Indeed, because that language provides the only definition of the term "foreign country" to be found anywhere in the legislative history of the FTCA, and because it supports the conclusion that the FTCA is limited to claims arising in the United States, it is difficult to see why petitioner affirmatively relies on this testimony.

3. The Court's decision in *United States* v. *Spelar*, 338 U.S. 217 (1949), also undermines petitioner's construction of the legislative history. Although the *Spelar* Court stated that "Congress was 'unwilling to subject the United States to liabilities depending upon the laws of a foreign power,'" Pet. Br. 15 (quoting *Spelar*, 338 U.S. at 221), it also observed that the legislative history of the FTCA confirms that "[t]he amended version [of the foreign-country

[17] This testimony provides particularly useful guidance as the contemporaneous interpretation of the department responsible for drafting the statutory provision. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 546 (1978).

exception] identified the coverage of the Act *with the scope of United States sovereignty*," and that "*the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States.*" 338 U.S. at 219, 220-221 (emphasis added). The latter statements strongly support the conclusion that the FTCA does not apply to claims arising outside the territorial jurisdiction of the United States.

Those statements do not definitively resolve the question at issue in this case, because *Spelar* did not involve the application of the foreign-country exception to claims arising in a foreign land subject to unresolved and conflicting assertions of sovereignty. But the fact that *Spelar* contains statements squarely inconsistent with petitioner's interpretation of the FTCA certainly belies her claim that "the Court in *Spelar* recognized that a claim under the FTCA could arise outside of the territory of the United States." Pet. Br. 15. *Spelar* in fact held that a claim arising on a United States military base overseas could not be asserted, and nothing in that opinion purports to override the plain import of the language and structure of the FTCA at issue here or the presumption against extraterritoriality. The *Spelar* Court's construction of the legislative history therefore further confirms that Antarctica is a "foreign country" within the meaning of the FTCA.

II. EVEN IF ANTARCTICA WERE NOT A "FOREIGN COUNTRY" FOR PURPOSES OF THE FEDERAL TORT CLAIMS ACT, CLAIMS ARISING IN ANTARCTICA WOULD NONETHELESS BE EXCLUDED FROM THE SCOPE OF THE ACT

Both in her opening brief and in her statement of the question presented, petitioner focuses exclusively on the question whether Antarctica is properly characterized as a "foreign country" for purposes of Section 2680(k). Pet. i; Pet. Br. i, 9-31. But even if petitioner were correct in her construction of the term "foreign country," her claim would still lack merit. As the Ninth Circuit ruled below, the FTCA would bar Antarctic tort claims even if Antarctica were not a "foreign country." Pet. App. 9 ("Even if we were to adopt the view that Antarctica is not a foreign country, we still could not agree that the coverage of the FTCA extends to Antarctica.").

The same factors discussed above in the context of the foreign-country exception are equally applicable to this alternative basis for the ruling below. The presumption against extraterritoriality forbids petitioner's construction of the statute *regardless* of the meaning of the term "foreign country," because nothing in the language or structure of the FTCA (or even its legislative history) provides the slightest indication, let alone the requisite clear expression, of any congressional intent to extend the FTCA beyond the borders of this Nation. Likewise, petitioner's attempted end-run around the FTCA's choice-of-law provision cannot be squared with the plain language of the statute, particularly when the rule that waivers of sovereign immunity are strictly construed has been taken into account. And petitioner's suggested interpretation would also result in the creation of a venue gap and lead to a result squarely rejected by Congress, providing still further reasons for concluding that Congress did not adopt petitioner's version of the Act. For all these reasons, then, the FTCA should be construed to preclude tort claims arising from conduct occurring outside the territory of the United States, even if the place where that

conduct occurs is not properly characterized as a "foreign country" under Section 2680(k).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
MAUREEN E. MAHONEY
Deputy Solicitor General
THOMAS G. HUNGAR
Assistant to the Solicitor General
ROBERT S. GREENSPAN
MARK B. STERN
Attorneys

SEPTEMBER 1992

APPENDIX

STATUTE AND TREATY INVOLVED

1. The Federal Tort Claims Act, ch. 753, 60 Stat. 842-847, codified as amended at 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, provides in pertinent part:

§ 1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 1402. United States as defendant

* * * * *

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or

wherein the act or omission complained of occurred.

* * * * *

§ 2680. Exceptions

The provisions of this chapter [171] and section 1346(b) of this title shall not apply to—

* * * * *

(k) Any claim arising in a foreign country.

2. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 UN.T.S. 71, provides in pertinent part:

* * * * *

Article IV

1. Nothing contained in the present Treaty shall be interpreted as:

(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create

any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

☆ U. S. GOVERNMENT PRINTING OFFICE 1992 312324 60030

SUPREME COURT, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

No. 91-1538

In The

Supreme Court of the United States

October Term, 1992

SANDRA JEAN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

DAVID J. BEDERMAN
Counsel of Record
Emory University
School of Law
Gambrell Hall
Atlanta, Georgia 30322
(404) 727-6822

DAVID GERNANT
Of Counsel
One Main Place
Suite 1890
P.O. Box 23594
Portland, Oregon 97281

ALLEN T. MURPHY, JR.
Attorney for Petitioner
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97201

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SANDRA JEAN SMITH, Petitioner

v.

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ON WRIT OF CERTIORARI TO

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FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

ANTARCTICA IS NOT A "FOREIGN COUNTRY" FOR THE PURPOSES OF THE FTCA.

1. The United States has tried mightily to complicate this straightforward case of statutory interpretation. At issue are two, innocuous words of the Federal Tort Claims Act

(FTCA) which exclude claims arising from a "foreign country," 28 U.S.C. § 2680(k), and their applicability to the sovereignless region of Antarctica. Petitioner has acknowledged that the words "foreign country" are capable of two meanings, imputing *either* any place beyond the territorial sovereignty of the United States *or* locations under the sovereignty of a foreign nation. If the Court had no further guidance from the statute and its drafting, the interpretation of the phrase "foreign country," which had so bedevilled earlier courts, would be problematic here.

We do, however, have instruction in the form of this Court's earlier holding on the "foreign country" exception in *United States* v. *Spelar*, 338 U.S. 217 (1949), where the Court noted that Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 221. Under this logic, because Antarctica is sovereignless and has no civil tort law of its own, it cannot be a "foreign country." Despite the United States' intimations to the contrary, Resp. Br. 28-32, this Court's previous identification of this critical purpose of the "foreign country" exception is sound and perfectly consistent with the remaining language of the statute (particularly the FTCA's choice of law command) and the balance of the sparse legislative history.

The United States would, apparently, wish for this Court to scuttle the *Spelar* rationale and replace it with an admittedly "bright-line" rule of categorically excluding all claims arising beyond the territory of the United States. The government forgets that *Spelar*'s emphasis, in determining whether a foreign law is in force in a particular region, has served our courts well in the past. There never has been any misunderstanding of this fundamental purpose of the "foreign country" exception. The United States' claim, Resp. Br. 29

n.15, that the reaffirmation of the *Spelar* principle to Antarctica would work untold mischief, is belied by our courts having consistently understood the key Congressional intent in avoiding the application of foreign law to an FTCA action, and having not once been beguiled into making such a misstep. Nor, for reasons which have already been explained, Pet. Br. 30-31, would foreign law ever be applied in an FTCA case arising from Antarctica.[1]

The United States has, as it must, conceded that Antarctica is a sovereignless place having no civil tort law of its own. Resp. Br. 4, 23 ("Antarctica has no sovereign . . . ."). To be sure, the Respondent prefers to characterize Antarctica as "disputed territory." That does not change the fact that under the current international legal régime for the Southern continent, no nation can purport to exercise territorial sovereignty there. Under the rationale in *Spelar*, Antarctica cannot be a "foreign country."

2. a. Realizing that its interpretation of the "foreign country" exception runs counter to Congress's fundamental intent, as enunciated in *Spelar*, the United States has chosen to rely totally on the canon of statutory construction that Congress does not typically intend to legislate abroad, what

[1] The government's scenario, Resp. Br. 18 n.8, suggesting that a foreign tort law *could* intrude in an FTCA action from Antarctica, is inept as a hypothetical, and also plain wrong in its conclusion. The government posits that a foreign national, once injured by the United States' negligence in Antarctica, would rush to become an American resident in order to secure a venue. Quite apart from the small problem of the FTCA's two-year statute of limitations, 28 U.S.C. § 2401(b), and other bars to acquiring residency in this country, there remains the point that the U.S. forum would still apply its own law to this action and not the law of the plaintiff's earlier domicile, which had been affirmatively abandoned.

is known as the *Foley* presumption.[2] But this Court has recently said in *EEOC* v. *Arabian American Oil Co.*, 111 S.Ct. 1227 (1991), that the rule of construction in *Foley* only "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1230 (*citing McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)). The government has realized, of course, that because Antarctica is sovereignless and has no tort law of its own, there can be no clash "between our laws and those of other nations." Indeed, the *Foley* presumption reinforces the outcome suggested by the Petitioner in this case.

Undeterred, the United States has decided to create

[2] The United States seems to put some faith, Resp. Br. at 20-21, in the canon of statutory construction that waivers of sovereign immunity are to be construed narrowly in favor of the government. Petitioner agrees that it must convince this Court that her reading of the FTCA's "foreign country" exception is logical and reasonable in application to Antarctica. Aside from this, presumptions and other principles of statutory construction "are not rules of law but merely axioms of experience." *Weinberger* v. *Rossi*, 456 U.S. 25, 28 (1982) (*quoting United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)). And, as this Court has recently declared, "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ." *Connecticut Nat. Bank* v. *Germain*, 112 S.Ct. 1146, 1149 (1992).

Moreover, this Court noted last Term that it has "narrowly construed *exceptions* to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act. . . ." *United States* v. *Nordic Village, Inc.*, 112 S.Ct. 1011, 1014 (1992) (*quoting United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)) (other emphasis added). If, as Petitioner argues, the fair and logical reading of the "foreign country" exception is that it does not apply to Antarctica, no canon of construction should prevent a holding of this Court to that effect.

some conflicts for its own benefit in this litigation. Resp. Br. 23-25. Petitioner does not discount the point that Antarctic affairs are the subject of delicate negotiations between the United States and the other Antarctic Treaty Consultative Parties (ATCPs). But, the government's additional contention that future FTCA claims from Antarctica could cause international friction is pure nonsense. As was earlier briefed, Pet. Br. 20-21, while the Antarctic Treaty prohibits assertions of *territorial* sovereignty, *see* Antarctic Treaty, Dec. 1, 1959, art. 4, para. 2, 12 U.S.T. 795, T.I.A.S. No. 4780, 402 U.N.T.S. 71, it freely permits a country to legislate the affairs of its nationals in Antarctica. For example, no nation has ever objected to the United States' extension of its penal or revenue laws to its nationals on the Southern continent.

Nor is any nation likely to object, as the United States fears, Resp. Br. 25, when the FTCA accords a remedy to American residents injured by the government's negligence in the Antarctic, while denying a domestic action to foreign domiciliaries. The reason that no objection would be raised is that such foreign nationals would *still* have a remedy: the time-honored practice of their own country making a diplomatic claim against the United States. So there is little merit to the government's contention that allowing FTCA suits to arise from Antarctica would cause international dissension.

b. But the United States' position goes further, Resp. Br. 25, arguing that when it comes to the extent of the *Foley* presumption -- and its concern over conflicts with foreign laws -- the executive's views ought to be given conclusive weight. Petitioner is deeply troubled by this proposed arrogation of the judicial function, which runs counter to the broader purpose of canons of construction in providing

certainty in statutory interpretation. It is assuredly not lost on this Court that the United States has been known to take admittedly contradictory views on the extraterritorial effects of Acts of Congress.[3]

The executive branch undoubtedly has good and sufficient reasons for taking the positions it does concerning the extraterritorial application of U.S. law. In this case, of course, the government desires to limit its exposure when it is negligent in Antarctica. Whatever the reason, it cannot outweigh the essential purpose of the FTCA's "foreign country" exception nor the proper role of canons of statutory construction in understanding it.

c. On a subsidiary point, the United States asserts (Resp. Br. 26) that the presumption against the extraterritorial application of U.S. law applies equally to sovereignless areas (including the high seas and Antarctica) even where there is no risk of conflict with another nation's laws. For this proposition it relies solely on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). A close examination of this case reveals no such assertion. Indeed, the approach taken by the Court in *Amerada Hess* squarely contradicts the United States' position here.

The truth is, of course, that the *Foley* presumption was never really implicated in *Amerada Hess*. This Court decided that the "tortious act" exception to the Foreign

[3] *Compare* Brief of the EEOC at 25-26, *EEOC* v. *Arabian American Oil Co.*, 111 S.Ct. 1227 (1991) (Nos. 89-1838 & 89-1845) ("Title VII is unlikely to generate serious conflicts with the laws of individual foreign states.") and Reply Brief of the EEOC at 15-16, *id.* (noting that "international law does not foreclose the extraterritorial application of Title VII in the context of U.S. employers which discriminate against U.S. citizens.") *with* Resp. Br. 23-25.

Sovereign Immunities Act's (FSIA's) blanket immunity to jurisdiction over foreign states and instrumentalities did not apply, *by its very terms*, to the high seas. *Id.* at 439-40. The reason was that the "tortious act" exception was limited to "occurr[ences] in the United States," 28 U.S.C. § 1605(a)(5), and the term "United States" was elsewhere defined in the FSIA as all "territory and waters, continental and insular, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c).

Obviously, if the FTCA's "foreign country" exception had been structured identically to the FSIA model, Petitioner would have no case. But the FTCA *was* drafted differently. Indeed, it was designed in a way to permit claims arising outside of United States territory, as long as they were not from a place under a foreign sovereign. As Congress has manifestly assimilated activities by nationals in Antarctica to those occurring on the high seas, *see* Pet. Br. 20-23, there are persuasive grounds to infer that the FTCA allows Antarctic claims.

3. Petitioner has consistently asserted that the logic of the "foreign country" exception precludes the application of a foreign law to an FTCA action. Consequently, she recognizes, as noted *supra* at 3 n.1, that it is incumbent upon her to show this Court that foreign law will not intrude in this case -- or any other in a like posture. Petitioner believes she has satisifed this showing, but the government has raised the theoretical point that "[i]nternational conflict-of-laws principles cannot, by sleight-of-hand, be transformed into the law 'of' Antarctica within the meaning of Section 1346(b)." Resp. Br. 15. Petitioner will revisit this issue since it appears that the government truly does not comprehend the relevant choice of law principles here.

The government seems to believe that persons, relationships, transactions, and incidents sited in Antarctica are subject to no substantive law nor to any choice of law direction that would lead a court to a proper law to apply. This would strip our nationals in Antarctica of the protection that their own law affords. This result is contrary to public international law which recognizes that people in *terra nullius* places "are not deprived of the protection of the law merely because of the absence of state sovereignty." Ian Brownlie, *Principles of Public International Law* 177 (4th ed. 1990).

More significantly, the courts in this country have said that the law of their forum would be applied to tort actions "arising in regions having no law that civilized countries would recognize as adequate." *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 478 (1912); *see also*, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 355-56 (1909); *Slater* v. *Mexican National R. Co.*, 194 U.S. 120, 129 (1904); *Walton* v. *Arabian American Oil Co.*, 233 F.2d 541, 545 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). In short, the old notion of "personal sovereignty," adopted from Britain, was specifically designed, and is still used,[4] to close the lacunae that the government believes to exist in Antarctica.

The weakness in the government's reasoning that Antarctica is "lawless," and thus there is no law to apply in this case, is illuminated by examining the situation on the

[4] Modern writers continue to endorse this doctrine, despite the fact that there are exceedingly few places on earth without their own civil tort law. *See 2 Dicey and Morris on the Conflict of Laws* 1376 n.29 (Lawrence Collins 11th ed. 1987) ("The case for displacement [of the *lex loci delicti* in favor of the law of the forum] is also strong in the more unlikely example of a tort committed by one member of a group of explorers against another in an uninhabited country.").

high seas. Our courts have repeatedly refused to bar claims on the ocean due to a lack of substantive law. As this Court stated in *The SCOTLAND*, 105 U.S. 24 (1881), "if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice . . . ." *Id.* at 29. In that courts have successfully dealt with the lack of substantive law on the high seas for hundreds of years, the same principle is applicable in this case.

If this were a tort case between two private litigants, the import of the government's argument is that there would be no law to apply in the action, and it would have to be dismissed. We know that this result is heartily disapproved, and yet the United States seeks to insulate itself from liability nonetheless. It is well-established, however, that another key intent behind the FTCA was to make the United States liable under the same terms as private individuals. The statute clearly states as much, 28 U.S.C. § 2674, and this Court has so confirmed. *See Indiana Towing Co., Inc.* v. *United States*, 350 U.S. 61, 64 (1955).[5]

Although Antarctica is sovereignless and thus lacks its own substantive law, choice of law principles fill the gap and predictably refer a forum to its own law to govern torts arising on the Southern continent. Whether one employs the

[5] *See also Tort Claims Against the United States: Hearings on H.R. 7236 before Subcomm. No. 1 of the Committee of the Judiciary*, 76th Cong., 3d Sess. 5 (1940) ("In effect, the United States is a corporation, exercising all the privileges and functions of a corporation, and should be answerable to its citizens for its wrongs in no less a degree than a private person or a body corporate.").

traditional rule of personal sovereignty or the Conflicts *Restatement* interest-balancing approach, the outcome is the same: Oregon law is applied as the law of the Petitioner's domicile, a law that her husband never abandoned by virtue of sojourning to Antarctica, and dying there.

The government's attempt to obfuscate the choice of law direction in the FTCA flies in the face of a simple truth: our domestic legal order will not tolerate our nationals working in Antarctica without the protection afforded by law. In large measure that protection has been provided by Congress in punishing citizens in Antarctica and taxing their income earned there. This treatment is totally consistent with the international legal status of Antarctica. Likewise, the underlying rationale of the FTCA itself supports a holding that Antarctica is not a "foreign country."

CONCLUSION

For the foregoing reasons, and those set forth in the Petitioner's opening brief, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be REVERSED.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
EMORY UNIVERSITY
SCHOOL OF LAW
Gambrell Hall
Atlanta, Georgia 30322
Telephone (404) 727-6822

DAVID GERNANT
Of Counsel
One Main Place, Suite 1890
P.O. Box 23594
Portland, Oregon 97281

ALLEN T. MURPHY, JR.
Attorney for Petitioner
410 Riviera Plaza
1618 S.W. First Avenue
Portland, Oregon 97201

October 4, 1992